Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

GERALD R. WALKER,
Petitioner,

v.

CONSOLIDATED BISCUIT COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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132 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a case involving a claim of improper discharge from employment under the Americans with Disabilities Act, Petitioner is obligated to prove as part of his prima facie case that he was discharged **solely** because of that disability or whether Petitioner need only prove that his disability or perceived disability was a motivating factor in his discharge.

2. Whether, on the record in the case in the Court below, Petitioner submitted sufficient evidence that Respondent discharged him because of its perception of his disability when Petitioner's testimony was buttressed by an affidavit of a co-worker and exhibits in the record authored by Respondent's employee referring to Petitioner's denial of an alcohol problem.

3. Whether on the record the Petitioner offered sufficient evidence to rebut Respondent's proffered explanation for its decision to terminate his employment, assuming Petitioner had established a prima facie case of disability discrimination when he has, by his own testimony and by affidavit of a co-worker and by introduction of exhibits, rebutted Respondent's proffered explanation for its decision to terminate him.

PARTIES TO THE PROCEEDING

Gerald R. Walker, Petitioner and Plaintiff-Appellant below, is an individual resident of the Village of Custar, County of Wood, State of Ohio and was formerly employed by Respondent.

Respondent, Defendant-Appellee below, Consolidated Biscuit Company, is a Corporation headquartered in Ohio which maintained a facility located in Hancock County, Ohio where Petitioner was employed. There are no parent companies and no subsidiary corporations of Respondent.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

JURISDICTION 1

STATEMENT OF THE CASE 1

Statement of Facts 1

Description of Proceedings Below 4

ARGUMENT 7

CONCLUSION 10

APPENDIX

Appendix A
United States Court of Appeals for the Sixth Circuit Order of July 17, 1997 denying Petitioner's petition for rehearing A1

Appendix B
Petition for Rehearing by Petitioner A3

Appendix C
Per Curiam Opinion of The United States Court of Appeals for the Sixth Circuit filed June 26, 1997 . . . . . A12

Appendix D
Memorandum Opinion Issued by District Court dated May 29, 1996 Granting Summary Judgment to Respondent A20

Appendix E
Judgment Entry Issued by District Court Dismissing Petitioner's Case on Summary Judgment Issued May 29, 1996 . . . . . A35

Appendix F
Merits Brief of Petitioner filed in the United States Court of Appeals for the Sixth Circuit, (Excerpts) A37

Appendix G
Complaint with Jury Demand Endorsed A48

Appendix H
Answer of Defendant Consolidated Biscuit Company filed in District Court July 24, 1995 . . . . . A53

Appendix I
Memorandum in Opposition to Defendant's Motion for Summary Judgment with Supporting Exhibits A57

Appendix J
Relevant Statutes A73

AMERICANS WITH DISABILITIES ACT
42 U.S.C. §12101 - 42 U.S.C. §12117 . . . . . A73

OHIO REVISED CODE
O.R.C. §4112.02 and §4112.99 . . . . . A91

29 C.F.R. §1630.2(1) A113

TABLE OF AUTHORITIES

CASES

United States Supreme Court

Price Waterhouse v. Hopkins,
490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed
268, 49 FEP Cases 954 (1989) 9

Circuit Courts of Appeal

Despears v. Milwaukee County,
63 F.3d 635 (7th Cir. 1995) 8

Doe v. University of Maryland Medical Systems,
50 F.3d 126, 4 AD Cases 379
(4th Cir. 1995) 8

Doherty v. Southern College of Optometry,
862 F.2d 570 (6th Cir. 1988), cert.
denied 493, U.S. 810 (1989) 7

Maddox v. University of Tennessee,
62 F.3d 843, 4 AD Cases 1253
(6th Cir. 1995) 7

McNely v. Ocala Star-Banner Corp.,
99 F.3d 1068, 6 AD Cases 78
(11th Cir. 1996) 8

Monnette v. Electronics Data Systems,
90 F.3d 1173 (6th Cir. 1996) 7

Myers v. Hose,
50 F.3d 278, 4 AD Cases 391
(4th Cir. 1995) 8

Rizzo v. Children's World Learning Center,
84 F.3d 758, 5 AD Cases 1155
(5th Cir. 1996) 8

Roush v. Weastec,
96 F.3d 840 (6th Cir. 1996) 7

White v. York International Corp.,
45 F.3d 357, 3 AD Cases 1746
(10th Cir. 1995) 8

Ohio Revised Code

R.C. 4112.02 1

R.C. 4112.99 1

United States Code

28 U.S.C. §1254 1

28 U.S.C. §1331 1

28 U.S.C. §1367 1

29 U.S.C. §790 et seq 7

42 U.S.C. §12101 et seq 1

42 U.S.C. 12101(b)(1) 8

42 U.S.C. §12212(a) 9

42 U.S.C. §12132 9

Legislative Material

H.R. Rep. No. 458(II), 101st Cong., 2nd Sess., at 85 (1990) 9

S. Rep. No. 116, 101st Cong., 1st Sess., at 44-45 (1989) 9

JURISDICTION

In the within case the judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 26, 1997. This decision was not recommended for full text publication by the Sixth Circuit and is attached, hereto, as Appendix C, A12. On July 10, 1997 Petitioner timely filed a petition for rehearing before the United States Court of Appeals for the Sixth Circuit (Appendix B, A3). In its order filed on July 17, 1997, the United States Court of Appeals for the Sixth Circuit denied Petitioner's petition for rehearing (attached as Appendix A, A1). This order is also unpublished. The jurisdictional basis for federal jurisdiction in the Court of first instance was pursuant to 42 U.S.C. §§12101 et seq., the Americans with Disabilities Act of 1990. Although not particularly stated in Petitioner's original Complaint in the District Court, jurisdiction was invoked pursuant to 28 U.S.C. §1331. Moreover, a supplemental claim under Ohio Revised Code §4112.99 as amended was set forth as count two of the original Complaint, the jurisdictional basis of which was the Court's supplemental jurisdiction under 28 U.S.C. §1367. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

STATUTES INVOLVED

The Statutes involved, 42 U.S.C. §§12101-12117 and Ohio Revised Code §§4112.01 and 4112.99 are set forth in Appendix J, A73.

STATEMENT OF THE CASE

Statement of Facts

Consolidated Biscuit Company terminated the employment of Gerald R. Walker, a supervisor, on May 4,

1994. At the time of his termination, Walker had been working as a line supervisor for Cracker Mixing on the third shift, supervising approximately eleven (11) employees. At the time of his termination, Walker had been employed by Respondent for approximately ten and one half (10½) years and had never been written up for a violation of Respondent's rules. It is clear that Walker was regarded as a good worker and a good supervisor and an adequate employee. Walker claimed that he suffers from a physical ailment known as rosacea, a skin condition affecting blood vessels of the skin covering the head and neck which manifests itself in a condition causing an enlarged nose, dilated pores and broken blood vessels over the cheek and nose area. Petitioner claimed that his physical condition did not substantially limit his major life activities but that it was regarded by the Respondent as constituting such limitation because of its attitude toward his employment (See Appendix G, A48).

During his course of employment Petitioner became the subject of far reaching rumors that he was a heavy drinker and that he reported to work on occasion being under the influence. In fact, as early as April of 1988, Respondent's Vice President of Operations had met with Petitioner to discuss the allegation that Petitioner had been coming into work under the influence of alcohol. These allegations were denied by Gerald Walker. The alcohol policy for Respondent was set forth in its employee handbook. The handbook lists "possessing, consuming, using, or being under the influence of intoxicating beverages...on company premises" as being dischargeable offenses. The alcohol and substance abuse policy for Respondent provided that any individual that was suspected of being under the influence of alcohol on company premises would be subject to blood/alcohol testing. Respondent's policies further provided that the refusal to permit such testing might result in discharge from

employment. The record indicates that if a supervisor detected alcohol on someone's breath, it was company policy to have the person taken to a hospital for a blood test. Deposition testimony indicates that the alcohol and substance abuse policies applied to both management and non-management personnel and that supervisors themselves were aware that they could get into trouble for failing to report their observation of violation of company policy (Appendix F, pages 20,21,23, A43, A44, A46).

Petitioner reported to work as regularly scheduled on May 2, 1994. Petitioner contends that he had not consumed any alcohol prior to arriving at work and was not under the influence of alcohol when he arrived but was suffering from back pain and lack of sleep at the time. After arriving at work, the Petitioner went to the scheduling room where he spoke to two supervisors. Later in the shift, a supervisor by the name of Daniel Kear approached Mr. Walker and accused him of having come to work under the influence of alcohol. Walker denied any consumption that evening and twice requested that he be sent for a blood/alcohol test to prove his sobriety. Walker was not sent for such a test. Subsequently, Supervisor Kear sent Walker home on the instruction of the Plant Manager rather than sending Walker for a blood/alcohol test. Curiously, on the same evening, Supervisor Kear had also been called upon to deal with another employee, named Tom Scott, who had been accused of coming to work under the influence of alcohol that evening. Scott was sent to Blanchard Valley Hospital for a blood/alcohol test (Appendix B, page 5, A7).

Upon instruction, Petitioner left the plant and was subsequently discharged for having a "drinking problem". The reason proffered for his discharge by Respondent was that Petitioner had violated Respondent's policy against

coming to work under the influence of alcohol.

Subsequent to Petitioner's discharge, Respondent sought to obtain an admission from him that he had been drinking before coming to work. Respondent attempted to contact Walker even after he was terminated to try to get him to admit to the Vice President of Operations that he had been drinking. Moreover, one employee, named Paula Pond informed Supervisor Kear that Respondent needed something more for its files that Petitioner admitted to having the drinks (Appendix B, pages 3-4, A5-6). After his termination, Petitioner informed Respondent that he would agree to an alcohol assessment at Lincoln Center in order to be considered for rehire. The same Paula Pond expressed worry in a memorandum about what the company would do if the results of such an assessment were negative. Moreover, a memorandum placed in Petitioner's personnel file after his termination described Petitioner as an alcoholic and in denial of his dependence without any reference to the source of this diagnosis (Appendix B, pages 3,4,5, A5,6,7: See also Appendix I, A57).

Description of Proceedings Below

The District Court disposed of this case on the employer's Motion for Summary Judgment. The District Court found, in its opinion, that Petitioner had failed to show that he was an "individual with a disability." The District Court reasoned that since Petitioner could not make up a prima facie case of disability discrimination, Summary Judgment must be granted to the Respondent. The District Court reasoned that both parties agreed that Respondent regarded Walker as having the impairment of alcoholism. However, the District Court then focused on whether the Respondent employer regarded Petitioner's perceived

alcoholism as substantially limiting one or more of his major life activities. The District Court then noted that Petitioner had pointed to nothing in the record that indicated that Respondent had considered alcoholism, per se, to be a substantially limiting impairment (Appendix D, A20). The District Court reasoned that the alcohol policies of the Respondent pertained only to alcohol use as opposed to alcohol status. The District Court then reasoned that even if the Petitioner had been able to establish a prima facie case of disability, the Respondent articulated a legitimate, non-discriminatory reason for its actions and Petitioner failed to show a triable issue exists as to whether Respondent's proffered explanation was a mere pretext. The District Court reasoned that Respondent stated that Petitioner was terminated for appearing at the workplace under the influence of alcohol and since that was a dischargeable offense, the Respondent sufficiently articulated a legitimate non-discriminatory reason. The Court further noted that Petitioner presented no direct evidence that Respondent discharged Petitioner because of his reputation as an alcoholic, but rather that Petitioner relied solely on circumstantial evidence that Respondent perceived him as an alcoholic. The Court proceeded to inquire into the plausibility of the circumstantial evidence and proceeded to grant Summary Judgment (Appendix D, p. 14, A33).

Mr. Walker appealed to the United States Court of Appeals for the Sixth Circuit. There, he presented three basic arguments. Firstly, Mr. Walker contended that the District Court committed error in granting Summary Judgment based upon its rationale that he could not claim disability status based on Respondent's perception that he was an alcoholic. Secondly, Petitioner contended that even if he were required to make a showing that his perceived impairment (being an alcoholic) was substantially limiting, the District Court committed error in finding that he did not present sufficient

evidence to create a genuine issue of fact as to whether the Respondent employer perceived alcoholism to be a substantially limiting impairment. Finally, Petitioner contended that the District Court committed error in finding that even if he had been able to establish a prima facie case of disability, the Respondent articulated a legitimate non-discriminatory reason for its actions and that Petitioner failed to show a triable issue exists as to whether the Respondent's proffered explanation was a mere pretext. In a Per Curiam Opinion filed on June 26, 1997 the United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court (Appendix C, A12).

The Sixth Circuit noted that if Respondent had regarded Petitioner as impaired as a result of alcoholism, that perception could have constituted a disability under the ADA. However, the Sixth Circuit did not reach the issue of whether Petitioner had a disability, because it found that Mr. Walker had failed to establish that he was discharged solely because of that disability. The Sixth Circuit moreover found that Walker was discharged because he reported to work intoxicated in violation of company policy and ignored Petitioner's own testimony, that of a co-worker and other evidence in the record. (See Appendices B, F, A3, A37).

This case presents several questions. Petitioner contends that the Sixth Circuit has borrowed a sole causation test from the Rehabilitation Act in the present case which was brought under the Americans with Disabilities Act. It is submitted that the sole causation test was improperly applied. Secondly, Petitioner contends that the Sixth Circuit improperly held that he did not present any affirmative evidence establishing that he was discharged because of his perceived disability. Finally, if Petitioner has, in fact, established a prima facie case of disability discrimination, he

has also presented sufficient evidence to rebut Respondent's preferred explanation for the decision to terminate his employment, despite the Sixth Circuit's finding.

ARGUMENT

Petitioner, as noted supra., claims that he was discharged because of the perceived disability of alcoholism. The Sixth Circuit held that it need not determine whether Petitioner had a disability because he failed in any event to establish that he was discharged **solely** because of his disability, a necessary element of his prima facie case.

The Sixth Circuit applied its sole causation analysis in *Doherty v. Southern College of Optometry*, 862 F.2d 570 (6th Cir. 1988), cert denied, 493 U.S. 810 (1989). That case was brought under 29 U.S.C. §790 et seq. which contains explicit statutory language setting forth sole causation. See 29 U.S.C. §794(a). The Sixth Circuit subsequently reasoned that the sole causation analysis applied with equal force to cases under the Americans with Disabilities Act in *Maddox v. University of Tennessee*, 62 F.3d 843, 4 AD Cases 1253 (6th Cir. 1995), a case which was brought both under the Rehabilitation Act and the Americans with Disabilities Act. The Sixth Circuit then proceeded to employ the sole causation analysis in cases brought under the Americans with Disabilities Act. *Monnett v. Electronics Data Systems*, 90 F.3d 1173 (6th Cir. 1996); *Roush v. Weastec*, 96 F.3d 840 (6th Cir. 1996).

It is submitted that the sole causation analysis employed by the Sixth Circuit is contrary to statutory language contained in the Americans with Disabilities Act. Moreover, there is a conflict in the Circuits on the issue of causation under the Americans with Disabilities Act which must be resolved by this Court.

Petitioner states that in *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 6 AD Cases 78 (11th Cir. 1996), the Eleventh Circuit specifically addressed the sole cause liability standard and rejected it. There the Court noted that the legislative history of the ADA clearly explains why Congress left the word (solely) out of Title I as applied to the burden of proof required to show that a discriminatory act caused an adverse employment act. The Court further noted that Title VII of the Civil Rights Act of 1964 does not have a sole cause burden of proof and noted that the plain language does not require a sole clause liability standard. The Court also noted that the fact that the Congress enacted the ADA against the backdrop of recent U.S. Supreme Court decisions that interpreted the phrase "because of" not to mean "solely because of" supports the conclusion that Congress did not intend an ADA claimant to have to show that an allegedly discriminatory act was the sole cause of an adverse employment act. Other Circuits, however, have taken the position that the words "because of" should mean "solely because of". See *Doe v. University of Maryland Medical Systems*, 50 F.3d 1261, 4 AD Cases 379 (4th Cir. 1995); *Myers v. Hose*, 50 F.3d 278, (4th Cir. 1995); *Rizzo v. Children's World Learning Centers*, 84 F.3d 758, 5 AD Cases 1155 (5th Cir. 1996); *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995); and *White v. York International Corp.*, 45 F.3d 357, 3 AD Cases 1746, (10th Cir. 1995).

The stated purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §12101(b)(1). Title I of the ADA which applies to the private sector, provides that

> No covered entity shall discriminate against a qualified individual with a disability because

> of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. §12112(a) (emphasis added).

See also 42 U.S.C. §§12112(a); 42 U.S.C. §12132.

Respondent contends that the statutory language requires only "but for" causation before liability can attach. Importing the restrictive term "solely" from the Rehabilitation Act into the ADA cannot be reconciled with the stated purpose of the ADA to eliminate discrimination against individuals with disabilities. 42 U.S.C. §12101(b)(1).

The sole causation analysis also runs counter to legislative history expressly stated with respect to the anti-retaliation provision of Title IV which has substantially identical relevant causal language in its liability provisions. See 42 U.S.C. §12112(a), 42 U.S.C. §12132 and 42 U.S.C. §12203. See also H.R. Rep. No. 485 (II), 101st Cong., 2nd Sess., at 85 (1990); S. Rep. No. 116, 101st Cong., 1st Sess., at 44-45 (1989).

When Congress enacted the ADA in 1990, this Court had already authoritatively determined that, for Title VII Cases, "because of" does not mean "solely because of." See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L. Ed. 2d 268, 49 FEP Cases 954 (1989). Congress enacted the ADA against the backdrop of this Court's employment discrimination law that interpreted "because of" **not** to mean "solely because of."

The Sixth Circuit has decided to employ a sole causation analysis in ADA cases despite clear congressional intent, clear statutory language, legislative history, and this Court's pronouncements on causation in employment cases. Conflict exists among the Circuits and confusion abounds with the many ADA cases now filed. This Court should speak on this issue for purposes of guidance for the sake of all parties.

This Court should also reverse the Sixth Circuit's findings that Petitioner presented no affirmative evidence that his perceived disability caused his termination and that Petitioner could not have shown that Respondent's proffered reason for termination was a pretext. The Sixth Circuit has overlooked Petitioner's sworn denials that he was under the influence of alcohol and a corroboration affidavit of a co-worker. The Sixth Circuit has also ignored several documentary exhibits and other evidence supporting Petitioner's testimony (See Appendices B, pages 3-5 and I, A5-8 and A57).

CONCLUSION

For reasons set forth in this Petition for Writ of Certiorari, Petitioner Walker respectfully requests that a writ issue as prayed for in order to review the aforedescribed Sixth Circuit Opinion set forth in Appendix C, A12.

Respectfully submitted,

WASSERMAN, BRYAN, LANDRY & HONOLD

/s/_____
Francis J. Landry
Counsel for Petitioner

Dated: October 14, 1997

APPENDIX

APPENDIX A

No. 96-3747

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
July 17, 1997
LEONARD GREEN, CLERK

GERALD WALKER, *Plaintiff-Appellant*,	)	
v.	)	**ORDER**
CONSOLIDATED BISCUIT CO., *Defendant-Appellee*.	)	

Before: Siler and Cole, Circuit Judges; Wiseman, District Judge

Upon consideration of the petition for rehearing filed by the appellant,

It is so ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

/S/_____
LEONARD GREEN, Clerk

APPENDIX B

No. 96-3747

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
July 10, 1997
LEONARD GREEN, CLERK

GERALD WALKER, *Plaintiff-Appellant*,	**PETITION FOR REHEARING**
v.	On appeal from the United States District Court for the Northern District of Ohio Western Division
CONSOLIDATED BISCUIT CO., *Defendant-Appellee.*	Francis J. Landry (0006072) **WASSERMAN, BRYAN, LANDRY & HONOLD** 405 N. Huron St. Toledo, OH 43604 Attorney for Plaintiff-Appellant, G. Walker

I. INTRODUCTION

Plaintiff-Appellant, Gerald R. Walker, herewith submits his petition for rehearing of the per curiam opinion issued by the panel of Circuit Judges Siler and Cole and District Judge Wiseman sitting by designation, filed June 26, 1997 in the above captioned case. The referenced per curiam opinion is hereto annexed as Appendix "A". Plaintiff-Appellant, Walker, submits this petition for rehearing to the panel rendering the aforedescribed decision. In its decision this Honorable Court affirmed the District Court's judgment which granted Summary Judgment in favor of Consolidated Biscuit Company, the Defendant-Appellee and which had the effect of dismissing Plaintiff's action which was brought under the Americans with Disabilities Act, 42 U.S.C. §12101 et seq. And Ohio Revised Code §4112.02.

In support of this petition for rehearing, Plaintiff-Appellant, Walker, notes that this Court correctly observed at page six (6) of its opinion, that he claimed that Consolidated violated the Americans with Disabilities Act and Ohio Revised Code §4112.02 by discharging him because of alcoholism. This Court correctly observed that the essence of his claim is that although he does not suffer from alcoholism his condition of rosacea caused Consolidated to regard him as having that disability. This Court further correctly noted that Walker, on appeal, argued that the District Court erred because Consolidated's view of him as having a substantially limiting impairment constituted disability within the meaning of ADA. Walker further contends that this Court correctly noted that if Consolidated regarded Walker as impaired as a result of alcoholism that perception could constitute a disability under ADA.

II. APPELLANT SUBMITTED EVIDENCE THAT APPELLEE DISCHARGED HIM SOLELY BECAUSE OF ITS PERCEPTION OF HIS DISABILITY

In its per curiam opinion issued June 26, 1997 at page seven (7), this Court noted that it need not determine whether Walker had a disability as defined by ADA because, assuming he had, Walker still failed to establish that he was discharged solely because of that disability. This Court further stated that Walker has not presented any affirmative evidence that he was discharged because Consolidated perceived him to be an alcoholic. This Court observed that the evidence indicated that Walker was discharged because he reported to work intoxicated on May 2, 1994 in violation of company policy. It is respectfully submitted that the documentary exhibits in the record show that subsequent to Walker's termination, Paula Pond, an employee of Consolidated, issued a memorandum to Jim Appold on the issue of Walker's termination. This memo issued on July 1, 1996. (R.30, Opposition by Plaintiff to Motion for Summary Judgment, Exhibit G). In that memorandum, paragraph four (4) reads in its entirety as follows:

> Jerry stated that he would agree to an alcohol assessment at the Lincoln Center in order to be considered for re-hire. I talked to John Philbin about this after Jerry had left, and John contacted the Lincoln Center to try to get an idea of their success rate during assessment in getting a person in total denial to admit their alcohol problem. The Lincoln Center will be calling John back Tuesday, July 5.

Moreover, the memo to Jerry Walker's file contained

as Exhibit H reads in its entirety as follows:

> Joyce Walker Jerry's wife stopped this afternoon June 13, 1994 to deliver a check for COBRA. She repeated Jerry's story that he had only slept a few hours and was suffering from a sacroiliac problem. Also that he was not impaired when he returned home. It has been my understanding that Mark Palte located him in a much more impaired state later that same morning. Mrs. Walker appears to be a very nice, well-intentioned wife who is as much in denial of Jerry's dependence as Jerry.

(R.30, Opposition by Plaintiff to Motion for Summary Judgment, Exhibit H).

Chronologically speaking, exhibits F, G, and H set forth by Appellant are in reverse order. Exhibit H is the note written when Mrs. Walker stopped by on June 13, 1994. At that point there is a reference in the record to Mrs. Walker being in denial just as was her husband. Exhibit G is a memo authored by Paula Pond on July 1, 1994 with reference to a person in total denial. Subsequent to that reference there is a query by Ms. Pond as to what to do if Mr. Walker would successfully complete a rehab program. Exhibit H contains the two handwritten memos of Paula Pond written on July 14, 1994 and July 19, 1994. Only at that point was she looking for evidence for the files stating that Jerry (Appellant) admitted to having the drinks and later on July 19, 1994 noting that Dan Kear was positive he smelled liquor on Jerry's breath but thought that Appellant had consistently denied drinking that evening.

These post termination memoranda buttress other evidence in the record. For example, during his employment

Walker was also the subject of "far reaching" rumors that he was a heavy drinker and that he reported to work on occasion being under the influence. (R.28, deposition of Daniel Kear, page 15). Kear, the overall supervisor on the third shift, testified in his deposition that he could not find anything that indicated that Walker was drinking. (R.28, deposition of Daniel Kear, page 16). Moreover, as early as April of 1988, the Consolidated Biscuit Company Vice President of Operations, Anthony Sabatino, met with Walker to discuss allegations that Walker had been coming into work under the influence of alcohol. Walker denied these allegations. (R.30, Opposition by Plaintiff to Motion for Summary Judgment, Exhibit D). Moreover, the alcohol policy itself is instructive. The record indicates that if a supervisor detected alcohol on someone's breath, it was company policy to have that person taken to a hospital for a blood test. (R.26, deposition of Robert Steingass at page 10; deposition of Mark Verhoff at pages 10-12). Moreover, evidence in the record shows that the alcohol and substance abuse policy is applied both to management and non-management personnel. (R.29, deposition of Robert Oehler, page 14). Walker himself testified that he reported to work as scheduled on May 2, 1994 and had not consumed any alcohol prior to arriving at work and was not under the influence of alcohol but was suffering from back pain and lack of sleep at the time. (R.30, Opposition by Plaintiff to Motion for Summary Judgment, Exhibit C, pages 2, 3, Exhibit E). Walker consistently denied being under the influence that evening and evidence shows that Walker requested a blood alcohol test but was not sent for one. Evidence in the record also shows that earlier in the evening Kear, the overall supervisor, had been called upon to deal with another employee named Tom Scott, who had been accused of coming to work under the influence of alcohol. Kear testified that he sent Scott to Blanchard Valley Hospital for a blood alcohol test. (R.28, deposition of Daniel

Kear at pages 24-26). Walker also testified that he was discharged by Anthony Sabatino for having a "drinking problem." (R.30, Opposition by Plaintiff to Motion for Summary Judgment, Exhibit C, page 1). Moreover, a memorandum placed in Walker's personnel file after his termination described him as an alcoholic in denial of his dependance without any reference to the source of this diagnosis. (R.30, Opposition by Plaintiff to Motion for Summary Judgment, Exhibits G and H). Walker also submitted an affidavit of one David Brose, a fellow employee who was employed in baker and cracker mixing on the third shift, who stated that on May 2, 1994 he did not believe Mr. Walker was under the influence of alcohol in any way at the time he spoke to him during his shift. (R.30, Opposition by Plaintiff to Motion for Summary Judgment, Exhibit D). It is respectfully submitted that based upon the above documents and testimony and based upon items in the record referred to in Plaintiff's Brief and Reply Brief that Walker has presented sufficient affirmative evidence to support his position that Consolidated perceived him to be an alcoholic and that he presented evidence contradicting the position of Consolidated that he was discharged because he reported to work intoxicated on May 2, 1994.

III. APPELLANT OFFERED SUFFICIENT EVIDENCE TO REBUT APPELLEE'S PROFERRED EXPLANATION FOR ITS DECISION TO TERMINATE HIM

Plaintiff-Appellant, Walker, additionally notes that at page seven (7) of its per curiam opinion, this Court reasoned that assuming, arguendo, that Walker had established a prima facie case of disability discrimination he has failed to offer sufficient evidence to rebut Consolidated's proferred explanation for its decision to terminate him. Appellant

agrees that had Consolidated properly discharged him because he reported to work under the influence of alcohol, that such employment decision would be entirely consistent with applicable law under the ADA and under Ohio's handicap discrimination statute. However, as set forth in this petition, supra, Walker has offered evidence to rebut Consolidated's proferred explanation including his own testimony and that of a worker who was present on the shift on that evening. It is respectfully urged that based upon the record Walker has set forth sufficient affirmative evidence that he was terminated because of his perceived status as an alcoholic and/or alcoholic in denial and that he has further brought forth sufficient evidence to create a triable issue of fact on whether the reason proferred by the employer, Consolidated, was in fact a pretext.

IV. THIS COURT SHOULD MODIFY ITS REQUIREMENT THAT APPELLANT PROVE AS PART OF HIS PRIMA FACIE CASE THAT HE WAS DISCHARGED SOLELY AS A RESULT OF HIS DISABILITY

In finding that Plaintiff failed to establish a prima facie case, this Court noted that it needed not determine whether Walker had a disability as defined by the ADA because assuming that he had Walker still failed to establish that he was discharged **solely** because of that disability, a necessary element of his prima facie case. See *Roush v. Weastec, Inc.*, 96 F. 3d 840 (6th Cir. 1996). It is respectfully urged that this Court reconsider its requirement that a Plaintiff need prove as part of his prima facie case that he was discharged **solely** because of that disability and permit him to prove rather that his disability was a motivating factor in his discharge.

Under the Americans with Disabilities Act, 42 U.S.C. §12112(a) it is provided that no covered entity shall

discriminate against a qualified individual with a disability because of the disability of such individual in regard to...discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. In Leary v. Dalton, 4 AD cases 1165 (1st Cir. 1995), the First Circuit noted that it was unclear, in light of recent amendments to the Rehabilitation Act that both §501 and §504 of that act incorporate the liability standards of Title I of the Americans with Disabilities Act of 1990. 42 U.S.C. §12111-12117. See 29 U.S.C. §§791 (g), 794(d). The First Circuit noted that §504 of the Rehabilitation Act alone continues to require a showing that Plaintiff's disability was the **sole** reason for the Defendant's adverse action. See 29 U.S.C. §794(a). The Court noted that the precise relationship between the ADA's liability standards and the sole causation tests were not well settled but did not breach the issue in that case. It is respectfully submitted that this Court should modify its requirement that Appellant prove as part of his prima facie case that he was discharged **solely** as a result of his disability and that it should replace that requirement with a requirement that a Plaintiff establish that his disability was a motivating factor in the discharge. If this Court were to accept the modified standard on the prima facie case it is submitted that Appellant Walker has submitted sufficient evidence as detailed in his Brief and Reply Brief and in this Petition for Rehearing, supra, to establish prima facie case.

V. CONCLUSION

For the reasons set forth in this Petition supra, Plaintiff-Appellant, Gerald R. Walker respectfully urges this Court to re-review the facts highlighted in this Petition and to modify its per curiam opinion filed June 26, 1997 and to reverse the decision of the District Court and remand this cause back to the District Court for further proceedings.

Respectfully submitted,

WASSERMAN, BRYAN, LANDRY &

/s/_____
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition for Rehearing was forwarded via Ordinary U.S. Mail this 9th day of July, 1997 to Robert J. Gilmer, **Eastman & Smith**, One Seagate, 24th Floor, P.O. Box 10032, Toledo, Ohio 43699-0032, attorney for Defendant-Appellee, Consolidated Biscuit Co.

/s/_____
Francis J. Landry
Attorney for Plaintiff-Appellant,
Gerald R. Walker

APPENDIX C

NOT RECOMMENDED FOR PUBLICATION

No. 96-3747

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
June 26, 1997
LEONARD GREEN, CLERK

GERALD WALKER, *Plaintiff-Appellant,*	)	
	)	**ON APPEAL FROM**
	)	**THE UNITED**
	)	**STATES DISTRICT**
	)	**COURT FOR THE**
v.	)	**NORTHERN**
	)	**DISTRICT OF OHIO**
CONSOLIDATED BISCUIT CO., *Defendant-Appellee.*	)	
	)	

BEFORE: SILER and COLE, Circuit Judges, and WISEMAN, District Judge.*

* The Honorable Thomas a. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

PER CURIAM. Plaintiff-Appellant Gerald R. Walker appeals the district court's order granting summary judgment in favor of Defendant-Appellee Consolidated Biscuit Company. On appeal, the plaintiff alleges that the defendant discriminated against him on the basis of a disability in violation of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, and Ohio Revised Code §4112.02. For the reasons set forth below, we AFFIRM the judgment of the district court.

I.

In 1984, Plaintiff Gerald Walker began his employment with Consolidated Biscuit Co. (Consolidated), a food manufacturer located in McComb, Ohio. According to Walker, Consolidated terminated him because of its perception that Walker had a substantially limiting disability--alcoholism. Walker denies that he suffers from alcoholism, but believes that his rosacea--a skin condition that causes blotchy skin and a red nose--caused a number of Consolidated's employees to think he reported to work under the influence of alcohol. In contrast, Consolidated claims that I fired Walker not because of any perceived disability, but because on May 2, 1994 he violated a written company policy that prohibited employees from reporting to work under the influence of alcohol.[1] Nonetheless, both parties agree that

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[1] The employee handbook provides:

Section a - Dischargeable Offenses

Any of these offenses may result in automatic discharge regardless of the previous record of an employee:

* * *

a-5. Possessing, consuming, using, or being under the influence of intoxicating beverages. . . on Company premises.

Consolidated's employees believed that Walker suffered from a drinking problem. Walker admits to drinking beer at company outings, but denies ever reporting to work under the influence of alcohol.

Packaging supervisors Mark Verhoff and Robert Steingass, however, testified that Walker appeared under the influence of alcohol while at work on a number of occasions. According to their testimony, these two supervisors personally observed Walker smelling of alcohol, slurring his speech, and appearing unbalanced. Several supervisors also testified that Walker reported to work under the influence of alcohol on May 2, 1994. Shift manager Daniel Kear testified that on May 2nd Walker spoke with slurred speech, staggered, talked loudly, bumped into him, and smelled of alcohol. Verhoff testified that Walker smelled like alcohol, slurred his speech, "talked bravely", acted belligerently, and looked drunk. Mixing supervisor Mark Palte also testified that Walker reported to work under the influence on May 2nd. According to Palte, Walker was "brave in his talking," belligerent, profane, aggressive, had difficulty walking, and slurred his speech. Walker denied that he reported to work intoxicated on May 2nd, and instead claims that he was suffering from back pain and a lack of sleep, and limped because of a hip injury. Walker does not deny that he used profanity or spoke with slurred speech, talked loudly, and acted belligerently, nor does he deny that he smelled of alcohol. Based upon the observations of the company's supervisors, Consolidated terminated Walker on May 4, 1994.

Alleging that he had been discriminated against in violation of the Americans with Disabilities Act and Ohio Revised Code § 4112.02, Walker filed a complaint in the United States District Court for the Northern District of Ohio

on July 3, 1995.[2] After the parties had completed discovery, Consolidated filed a motion for summary judgment. Concluding that Walker failed to establish that he was disabled within the meaning of the ADA, the district court granted Consolidated's motion for summary judgment on May 29, 1996. This timely appeal followed.

II.

We review de novo a district court's order granting summary judgment. *City Management Corp. V. U.S. Chem. Co.*, 43 F.3d 244, 250 (6th Cir. 1994); *Adams v. Metiva*, 31 F.3d 275, 378 (6th Cir. 1994). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the evidence, all facts, and any inferences that may be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)(per curiam)).

III.

The Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, makes it unlawful for employers to discriminate against disabled persons. *Andrews v. Ohio*, 104

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[2] On October 24, 1994, the plaintiff filed a complaint with the Ohio Civil Rights Commission and the EEOC. The EEOC issued a "right to sue" letter on May 8, 1995.

F.3d 803, 806 (6th Cir. 1997). Specifically, the ADA prohibits discrimination against a "qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a)(1994). A qualified individual with a disability is one "with a disability who, with or without reasonable accommodation, can perform the essential functions" of the position the individual holds or desires. *Id.* § 12111(8).

A plaintiff who lacks direct evidence of disability discrimination may establish a prima facie case of such discrimination by presenting evidence from which a jury could infer discriminatory intent behind the adverse employment action. *See Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1179 (6th Cir. 1996). A plaintiff establishes a prime facie case by showing that: (1) the plaintiff was disabled; (2) the plaintiff was qualified for the position with or without a reasonable accommodation; and (3) the plaintiff was denied a reasonable accommodation for the disability or was subject to an adverse employment decision that was made solely because of the disability. *See Roush v. Weastec, Inc.*, 96 F.3d 840, 843 (6th Cir. 1996).

The *McDonnell Douglas/Burdine*[3] burden-shifting framework utilized in other employment discrimination cases also applies in employment discrimination cases based on disability. *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 882 (6th Cir. 1996). Thus, if a plaintiff establishes a prima facie case of disability discrimination, the burden shifts

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[3] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

to the defendant to articulate a legitimate, nondiscriminatory explanation for the adverse employment action. *Id.* at 883. If the defendant meets this burden, then the plaintiff must prove that the defendant's reasons were merely a pretext for discrimination. *Monette,* 90 F.3d at 1186. The ultimate burden of persuading the fact-finder that illegal discrimination took place, however, remains at all times with the plaintiff. *Id.* at 1186-87.

Walker's complaint alleged that Consolidated terminated him in violation of the ADA and Ohio law, which prohibits employers from discriminating against an individual on the basis of "race, color, religion, sex, national origin, handicap, age or ancestry. . ." Ohio Rev. Code §4412.02(a) (1995). Because evidence sufficient to support a finding of discrimination under Ohio Revised Code § 4112.02, *see Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992), we consider Walker's federal and state claims together.

The ADA defines the term disability as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (1994). An impairment is "substantially limiting" if it results in an inability to perform, or a severe restriction on the ability to perform as compared to the average person in the general population, *see* 29 C.F.R. 1630.2(j)(2) (1996), and the term "major life activities" includes functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking,

breathing, learning, and working. *Id.* § 1630.2(i).

The applicable regulations provide three ways in which a plaintiff can illustrate that an employer regarded the plaintiff as disabled: (1) the individual may have an impairment which is not substantially limiting but is perceived by the employer as a substantially limiting impairment; (2) the individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or (3) the individual may have no impairments at all but is regarded by the employer as having a substantially limiting impairment. *Id.* § 1630.2(l).

In the district court, Walker claimed that Consolidated violated the ADA and Ohio Revised Code § 4112.02 by discharging him because of alcoholism. The essence of Walker's claim is that although he does not suffer from alcoholism, his condition of rosacea caused Consolidated to regard him as having that disability. The district court, however, concluded that Walker failed to establish a prima facie case of disability discrimination because he did not establish that he was disabled within the meaning of the ADA. On appeal, Walker argues that the district court erred because Consolidated's view of him as having a substantially limiting impairment constituted a disability within the meaning of the ADA.

If Consolidated regarded Walker as impaired as a result of alcoholism, that perception could constitute a disability under the ADA. *See Maddox v. University of Tennessee,* 62 F.3d 843, 846 (6th Cir. 1995) (assuming without deciding that alcoholism may qualify as a disability under the Rehabilitation Act and the ADA). However, we need not determine whether Walker had a disability as defined by the ADA, because assuming that he had, Walker still failed to establish that he was discharged solely because of that disability--a necessary element of his prima facie case. *Roush,* 96 F.3d at 843. Walker has not presented any

affirmative evidence that he was discharged because Consolidated perceived him to be an alcoholic; rather, the evidence indicated that Walker was discharged because he reported to work intoxicated on May 2, 1994, in violation of company policy. "It is now quite well established that, in order to withstand a motion for summary judgment, the party opposing the motion must present 'affirmative evidence' to support [-that party's] position; a mere 'scintilla of evidence' is insufficient. *Mitchell,* 964 F.2d at 584 (citation omitted). Walker, therefore, has failed to establish a prima facie case of disability discrimination.

Assuming, *arguendo*, Walker had established a prima facie case of disability discrimination, he has failed to offer sufficient evidence to rebut Consolidated's proferred explanation for its decision to terminate him. *See, e.g., Mitchell,* 964 F.2d at 584-85. Consolidated contends that it discharged Walker because he reported to work under the influence of alcohol. Such an employment decision is entirely consistent with applicable law; the ADA provides that employers "may prohibit. . .the use of alcohol at the workplace by all employees" and "may require that employees. . .not be under the influence of alcohol. . . at the workplace." 42 U.S.C. § 12114(C) (1994). Because Walker cannot establish a prima facie case of disability discrimination, and because he cannot offer any evidence to rebut Consolidated's proferred explanation, no genuine issues of material fact exist concerning whether Consolidated discharged Walker in violation of the ADA and Ohio Revised Code § 4112.02.

IV.

For the foregoing reasons, we hereby **AFFIRM** the district court's judgment.

APPENDIX D

No. 3:95 CV 7398

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
May 29, 1996
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
TOLEDO

GERALD WALKER, *Plaintiff*,	)	
v.	)	**MEMORANDUM OPINION**
CONSOLIDATED BISCUIT CO., *Defendant*.	)	

KATZ, J.

This matter is before the Court on Defendant's motion for summary judgment and Plaintiff's opposition thereto. For the following reasons, Defendant's motion will be granted.

I. BACKGROUND

Plaintiff Gerald R. Walker ("Walker") is a former employee of Defendant Consolidated Biscuit Company ("CBC"). Plaintiff brought this action alleging that he was wrongfully terminated in violation of the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.* And Ohio Rev. Code § 4412.02(a).

Plaintiff began his employment with Defendant in 1984. At the time of his termination on May 4, 1994, he was a line supervisor for cracker mixing on the third shift. The parties' accounts of the events leading up to and including Plaintiff's termination differ dramatically. Defendant claims that Plaintiff was fired for violating a written company rule by reporting to work under the influence of alcohol on May 2, 1994. Plaintiff denies that he reported to work under the influence of alcohol. He claims that Defendant fired him because of its erroneous perception that he was an alcoholic.

The parties agree that Defendant was widely perceived by the employees with whom he worked as having an alcohol problem prior to May 2, 1994. Plaintiff denies that he has an alcohol problem, (Pl.'s Dep. At 17-18), and further denies that he has ever appeared at work under the influence of alcohol, (*id.* at 24-27). He admits to drinking beer at company-sponsored golf outings, but denies that he ever drank to the point of impairment at such outings, (*id.* at 19-20). Plaintiff claims that his co-workers erroneously thought he had an alcohol problem because he has rosacea, a skin condition that causes blotchy skin and a red nose, (*id.* at 18), and erroneously accused him of coming to work with alcohol on his breath because his aftershave smelled like alcohol, (*id.* at 26).

Defendant's employees state that Plaintiff appeared at work under the influence of alcohol, both on and before May 2, 1994. Packaging supervisor Mark Verhoff states that he

personally saw Plaintiff appear at work under the influence of alcohol on multiple occasions prior to May 2, 1994. He says that on those occasions he smelled alcohol on Plaintiff's breath, and Plaintiff's speech was slurred. (Verhoff Dep. at 13-14). Packaging supervisor Robert Steingass states that he saw Plaintiff appear at work with alcohol on his breath, slurring his words, and "unbalanced" before May 2, 1994. (Steingass Dep. at 13-14). Steingass says that Plaintiff's rosacea did not influence his impression of Plaintiff's condition, because Plaintiff's appearance was always reflective of rosacea. *Id.* at 17-18. Shift manager Daniel Kear states that he smelled alcohol on Plaintiff's breath prior to May 2, 1994. (Kear Aff. at 2.) Plant manager Robert Oehler states that Plaintiff was under the influence of alcohol at two company-sponsored golf outings. (Oehler Dep. at 10.)

Daniel Kear states that Plaintiff appeared at work under the influence of alcohol on May 2, 1994. Kear reports that Plaintiff was slurring his speech, staggering, being "loud", had trouble walking, bumped into Kear, could not replace a cap on his pen, and smelled of alcohol. (Kear Aff. at 2-4; Kear Dep. at 22-24, 27-28). Kear states further that Plaintiff's gait was not a limp, but the gait of a person who was intoxicated. (Kear Aff. at 2.) Mark Verhoff also states that he saw Plaintiff under the influence of alcohol on May 2, 1994. According to Verhoff, Plaintiff smelled like alcohol, was jittery, was slurring his speech, was "talking bravely", acted belligerent, and "looked drunk". (Verhoff Aff. at 2; Verhoff Dep. at 18-19). Mixing supervisor Mark Palte states that he saw Plaintiff under the influence of alcohol on May 2, 1994. Palte states that Plaintiff was "brave in his talking", belligerent, profane, and aggressive, had difficulty walking, and was slurring his words. (Palte Aff. at 2.) Kear, Verhoff, and Palte agree that Plaintiff was completely intoxicated on the night in question.

Plaintiff denies that he came to work under the

influence of alcohol on May 2, 1994. He states that he was suffering from back pain and lack of sleep when he arrived at work. He denies that he was staggering; he says that he was limping because of a hip injury, but could walk a straight line. (Pl.'s Dep. at 44.) He denies that he bumped into Daniel Kear. (Pl.'s Aff. at 3.) He denies that he was unable to replace the cap on the pen. (*Id.*) He does not deny that he slurred his words, and offers no explanation for his slurred speech, other than his general allegation of fatigue. He does not deny that he was loud, belligerent, jittery and profane. He does not deny that he smelled of alcohol, and he states that he was not using aftershave or mouthwash that smelled of alcohol on that evening. (*Id.* at 45.)

As a matter of company policy, "possessing, consuming, using or being under the influence of intoxicating beverages" at Defendant's plant is an offense that may result in automatic discharge regardless of the employee's previous record. The company may require an employee it has reasonable cause to believe is under the influence of alcohol to submit to a blood alcohol test. Although the written language of the company policy gives Defendant discretion in ordering blood alcohol tests, (Pl.'s Mem. Opp'n Summ. J. Ex. B), the company in practice had a policy of ordering such tests routinely whenever it suspected an employee to be under the influence of alcohol, (Oehler Dep. at 14; Steingass Dep. at 10; Verhoff Dep. at 10-12).

Plaintiff did not receive a blood alcohol test on May 2, 1994. Plaintiff alleges that he requested such a test, but Defendant did not give him one. Defendant's employees say they do not remember Plaintiff asking for a blood alcohol test. Defendant claims that Plaintiff was not tested both because Plaintiff was a management employee and they did not want him to suffer the embarrassment of being taken to the hospital for a blood alcohol test, and because Plaintiff was obviously intoxicated.

On May 4, 1994, Plaintiff was terminated for reporting to work under the influence of alcohol.

Plaintiff brought this action, alleging that he was terminated in violation of ADA and the analogous Ohio statute. He claims that he is protected by ADA because his rosacea causes his employer to perceive him as having the disability of alcoholism, and that he was fired because of such perceived alcoholism.

Defendant responds that Plaintiff is not covered by ADA because his rosacea is not a disability, and argues further that even if Plaintiff is covered by ADA, Plaintiff was fired for appearing at work under the influence of alcohol, rather than for his perceived alcoholism. Defendant has moved for summary judgment.

II. DISCUSSION

A. Summary Judgment Standard

As an initial matter, the Court sets forth the relative burdens of the parties once a motion for summary judgment is made. Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catreet,* 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 191 L. Ed. 2d 265 (1986). Of course, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Id.* at 323, 106 S. Ct. at 2553. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is

a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2541, 91 L. Ed. 2d 202 (1986) (*quoting* Fed. R. Civ. P. 56(e)).

Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553. Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c).

B. Americans with Disabilities Act Standard

The Americans with Disabilities Act prohibits a covered employer from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to...the hiring, advancement, or discharge of employees...and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). A "disability" is (A) a physical or mental impairment that substantially limits one or more of the major life activities of [an]individual; (B) a record of such an

impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

In order to establish a *prima facie* case of disability discrimination in the employment context, a plaintiff must allege and prove (1) that he is an individual with a disability; (2) that he is otherwise qualified for the position he seeks or holds; and (3) that he was excluded from the position under circumstances that raise a reasonable inference of unlawful discrimination. *See Pesterfield v. Tennessee Valley Auth.*, 941 F.2d 437, 441 (6th Cir. 1991) (citing *Southeastern Community College v. Davis,* 442 U.S. 397, 406, 99 S. Ct. 2361, 2367, 60 L. Ed. 2d 980 (1979); *Ennis v. National Ass'n of Business & Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995). When the plaintiff has established a *prima facie* case of discrimination, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its decision. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973). Once the employer meets its burden, the burden shifts back to the plaintiff to prove that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination. *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S. Ct. 1089, 1093, 67 L. Ed. 2d 207 (1981); *see also Betkerur v. Aultman Hops. Ass'n,* 78 F.3d 1079, 1095 (6th Cir. 1996); *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1160 (6th Cir. 1990).

C. Ohio Employment Disability Discrimination Standard

It is unlawful in Ohio "[f]or any employer, because of the...disability...of any person...to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." Ohio Rev. Code § 4412.02(a). The Ohio Supreme Court has held that the coverage of §

4412.02(a) is identical to the coverage of federal law prohibiting discrimination in the employment context. Thus, evidence sufficient to support a finding of discrimination under Title VII of the Civil Rights Act of 1964 is necessary before a violation of § 4412.02(a) can be shown. *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm'n,* 66 Ohio St. 2d 192, 196, 421 N.E.2d 128, 131 (1981); *see also Little Forest Medical Ctr. of Akron v. Ohio Civil Rights Comm'n,* 61 Ohio St. 3d 607, 609-610, 575 N.E.2d 1164, 1167 (1991), *cert. denied,* 503 U.S. 906 112 S. Ct. 1263, 117 L. Ed. 2d 491 (1992); *El Grande Steak House v. Ohio Civil Rights Comm'n,* 99 Ohio App. 3d 557, 562, 651 N.E.2d 440, 444 (1994); *Twinsburg City Schools v. Ohio Civil Rights Comm'n,* 86 Ohio App. 3d 527, 529, 621 N.E.2d 591, 593 (1993). Accordingly, the Court will address Plaintiff's federal and state law claims together.

D. Merits of Plaintiff's Discrimination Claim

1. *Prima Facie* Case

In order to establish a *prima facie* case of employment discrimination in the context of this case, Plaintiff must show (1) that he is an individual with a disability; (2) that he was performing his job at a level that met his employer's legitimate expectations; and (3) that he was discharged from the position under circumstances that raise a reasonable inference of unlawful discrimination. *See Ennis,* 53 F.3d at 58.

The first question is whether Plaintiff has shown that he is an individual with a disability: *i.e.*, that he (A) has a physical or mental impairment that substantially limits one or more of his major life activities (B) has a record of such an impairment; or (C) is regarded as having such an impairment. *See* 42 U.S.C. 12102(2). Plaintiff alleges that he qualifies as

an individual with a disability under 42 U.S.C. § 12102(2)(C) because his rosacea causes his employer to regard him as having the disability of alcoholism. Courts have consistently held that alcoholism qualifies as a disability for purposes of ADA. *See, e.g., Newland v. Dalton,* 81 F.3d 904 (9th Cir. 1996); *Williams v. Widnall,* 79 F.3d 1003 (10th Cir. 1996); *Despears v. Milwaukee County,* 63 F.3d 635 (7th Cir. 1995); *Leary v. Dalton,* 58 F.3d 748 (1st Cir. 1995); *see also Maddox v. University of Tenn.*, 62 F.3d 843, 846 (6th Cir. 1995)(Court assumed, without deciding, that alcoholism is a disability for ADA purposes); *Tinch v. Walters,* 765 f.2d 599, 603 (6th Cir. 1985) (alcoholism is a disability for purposes of the Rehabilitation Act, 29 U.S.C. § 706(7)(B)). Defendant admits that it regarded Plaintiff as being an alcoholic. Therefore, argues Plaintiff, Defendant regarded Plaintiff as having a disability for purposes of ADA.

Defendant responds that Plaintiff cannot claim disability status based on his perceived alcoholism because Defendant, although it admittedly regarded Plaintiff as being an alcoholic, did not regard such alcoholism as being a substantial impairment.[1]

The parties' dispute centers on the proper construction of the phrase "regarded as having such an impairment" in 42 U.S.C. § 12102(2)(C). Plaintiff argues that "regarded as having such an impairment" means that the employer regards the employee as having a given impairment, and that the *employer itself* subjectively regards the impairment as

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[1] Defendant also correctly points out that Plaintiff cannot successfully claim he is disabled because of his rosacea, because the rosacea itself does not substantially limit any of Plaintiff's major life activities, and Defendant does not believe that the rosacea substantially limits any of Plaintiff's major life activities.

substantially limiting a major life activity of the employee.

The Code of Federal Regulations sets forth three ways in which an employee may be regarded as having an impairment. (1) The employee may have a physical or mental impairment that does not substantially limit major life activities but is treated by the employer as constituting a limitation. (2) The employee may have an impairment that substantially limits major life activities only as a result of others toward the impairment. (3) The employee may have no impairment but be treated by a covered entity as having substantially limiting impairment. 29 C.F.R. § 1630.2(*l*). In *School Board of Nassau County v. Arline,* 480 U.S. 273, 283, 107 S. Ct. 1123, 1128-29, 94 L. Ed. 2d 307 (1987), the Supreme Court explained that the "regarded as" prong protects employees from discrimination based on impairments that "might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." The Court went on to explain that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Id.* at 284, 107 S. Ct. at 1129. Thus, if an employee can show that an employer discharged him because of a perception of disability based on myth, fear or stereotype, the employee can satisfy the "regarded as" part of the definition of disability. 29 C.F.R. Pt. 1630, App.

The few published opinions addressing the issue of "perceived disability" have consistently held that the focus of the inquiry should be on the employer's subjective attitude toward the employee. *Wooten v. Farmland Foods,* 58 F.3d 382, 385 (8th Cir. 1995); *Forrisi v. Bowen,* 794 F.2d 931, 934 (4th Cir. 1986); *Greenberg v. New York State,* 919 F.Supp. 637, 642-42 (E.D.N.Y. 1996; *Muller v. Hotsy Corp.*, 917 F.Supp. 1389, 1406 (N.D. Iowa 1996); *Kelly v.*

Drexel Univ., 907 F. Supp. 864, 874-75 (E.D. Pa. 1995). The language of the Federal Regulation at issue states that the employee is "regarded as" disabled only if he is "*treated* by a covered entity as having a substantially limiting impairment." 29 C.F.R. § 1630.2(*l*)(3) (emphasis added). The Court, therefore, engages in a two-step process: first, it asks whether the employer regards the employee as having an impairment; if so, it then asks whether the employer regards the impairment as substantially limiting one or more of the employee's major life activities. *Greenberg,* 919 F. Supp. at 641-42.

The parties agree that Defendant regarded Plaintiff as having the impairment of alcoholism. They disagree as to whether Defendant regarded Plaintiff's perceived alcoholism as substantially limiting one or more of his major life activities. Defendant denies that it regarded Plaintiff's perceived alcoholism, as distinguished his from alcohol use, as a substantially limiting impairment. Plaintiff counters that the record is rife with evidence that Defendant perceived alcoholism *per se* to be a substantially limiting impairment. In support of his contention, Plaintiff cites to Defendant's policy prohibiting employees from using or possessing alcohol at the work site, or coming to work under the influence of alcohol, and the 1988 record in Plaintiff's personnel file indicating Defendant's concern that Plaintiff was coming to work under the influence of alcohol.

Plaintiff's effort is unavailing. Plaintiff has failed to distinguish between Defendant's policies and statements regarding the disability of alcoholism itself, and Defendant's policies and statements regarding unacceptable misconduct caused by alcohol use. *See Maddox,* 62 F.3d at 847. The distinction is vital. While Defendant may not discharge or otherwise discriminate against an alcoholic employee whose alcoholism does not affect his job performance, an employer may hold an alcoholic employee to the same standards for job

performance and behavior as it holds other employees, even if the misconduct is related to the employee's alcoholism. 42 U.S.C. § 12114(c)(4). Stated another way, an employer is not required to accommodate the disability of alcoholism.

Every CBC policy, position, or statement proferred by Plaintiff in support of his argument that Defendant considers alcoholism substantially to limit a major life activity of the employee is a policy related to alcohol *use*, as opposed to alcoholic *status*. Plaintiff has pointed to nothing in the record that indicates Defendant considered alcoholism *per se* to be a substantially limiting impairment. Its sole concern, so far as the record shows, was with alcohol-related impairment on the job.

Federal law expressly provides that an employer may prohibit the use of alcohol at the workplace by all employees, and may prohibit employees from appearing at work under the influence of alcohol. 42 U.S.C. § 12114(c)(1) & (2). Plaintiff has alleged nothing more than that CBC prohibited the use of alcohol at the workplace by all employees, and prohibited employees from appearing at work under the influence of alcohol. This Court cannot use Defendant's behavior as the basis of a discrimination claim when that behavior has been expressly authorized by Congress.

Accordingly, the Court finds that Plaintiff cannot claim disability status based on Defendant's perception that Plaintiff was an alcoholic. Since Plaintiff is not an "individual with a disability," he is excluded from coverage under ADA and Ohio Rev. Code § 4112.02(a). Therefore, he cannot make out a *prima facie* case of disability discrimination, and summary judgment must be granted to Defendant on Plaintiff's disability claims.

2. Legitimate, Non-Discriminatory Reason and Pretext

The Court finds in addition that, even had Plaintiff

been able to establish a *prima facie* case of disability discrimination, Defendant articulated a legitimate, non-discriminatory reason for its action, and Plaintiff failed to show that a triable issue of fact exists as to whether Defendant's proferred explanation was a mere pretext.

Defendant stated that Plaintiff was terminated for appearing at the workplace under the influence of alcohol. "[B]eing under the influence of intoxicating beverages" at work is a dischargeable offense. Therefore, Defendant sufficiently articulated a legitimate, non-discriminatory reason for its action. The burden then shifted to Plaintiff to introduce evidence that Defendant's explanation for its action was pretextual.

Plaintiff denies that he was under the influence of alcohol on the night of May 2, 1994. He claims that Defendant's agents denied him the opportunity to clear his name through a blood test in violation of company policy because Defendant's agents thought they knew what the test would show, based on Plaintiff's reputation as an alcoholic. Plaintiff also submits an affidavit from a co-worker, David Brose, who states that he did not believe Plaintiff was under the influence of alcohol on May 2, 1994.

On a motion for summary judgment, the Court must take Plaintiff's direct factual allegations as true. The Court accepts, for purposes of this summary judgment motion, Plaintiff's allegations that he was not under the influence of alcohol on May 2, 1994. The Court also accepts Plaintiff's assertion that Defendant's agents denied him the opportunity to clear his name through a blood test in violation of *de facto*, if not written, company policy.

In order to show pretext, however, Plaintiff must show more than that he was not under the influence of alcohol and that Defendant's agents denied him the opportunity to clear his name through a blood test. Plaintiff must show that he was discharged because of Defendant's agents' belief that

Plaintiff was an alcoholic; he must demonstrate a nexus between his reputation as an alcoholic and his discharge. The fact that a case involves subjective issue - Defendant's agents' beliefs and motivations - does not necessarily render the case inappropriate for summary judgment. *Cox v. Ky. Dep't of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

Plaintiff has presented no direct evidence that Defendant discharged him because of his reputation as an alcoholic. Plaintiff relies solely on the circumstantial evidence that Defendant perceived him as an alcoholic, and that he was denied an opportunity to take a blood test. a party may rely on circumstantial proof to oppose a motion for summary judgment in a discrimination action, *Cox,* 53 F.3d at 152, but the trial court has some discretion to inquire into the plausibility of the proffered circumstantial evidence, *Adams v. Metiva,* 31 F.3d 375, 382 (6th Cir. 1994); *Street,* 886 F.2d at 1480. Viewing the record as a whole, the Court finds that Plaintiff's evidence cannot reasonably be construed to support an inference of discrimination. Plaintiff nowhere denies that on May 2, 1994 he smelled of alcohol, had difficulty walking, had slurred speech, and was loud, belligerent, jittery and profane; these are symptoms of intoxication. Defendant offered a legitimate, non-discriminatory reason for its failure to give Plaintiff a blood test. Plaintiff has presented no evidence, either direct or circumstantial, that Defendant considered alcohol*ism*, as opposed to alcohol *use*, to be a substantial threat to an employee's job performance. Plaintiff has not made a sufficient showing of pretext to survive a motion for summary judgment.

III. CONCLUSION

For the above reasons, Defendant's Motion for Summary Judgment is granted.

/s/_____
DAVID a. KATZ
UNITED STATES DISTRICT JUDGE

APPENDIX E

No. 3:95 CV 7398

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
May 29, 1996
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
TOLEDO

GERALD WALKER, *Plaintiff*,	)	
v.	)	**JUDGMENT ENTRY**
CONSOLIDATED BISCUIT CO., *Defendant*.	)	

KATZ, J.

For the reasons stated in the Memorandum Opinion filed contemoraneously with this entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Defendant's motion for summary judgment (Doc. No. 17) is granted.

/s/_____
DAVID A. KATZ
UNITED STATES DISTRICT JUDGE

APPENDIX F

CASE NO. 96-3747

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GERALD R. WALKER
Plaintiff-Appellant

v.

CONSOLIDATED BISCUIT CO.
Defendant-Appellee

On Appeal from the United States District Court
for the Northern District of Ohio
Western Division

BRIEF OF PLAINTIFF-APPELLANT
GERALD R. WALKER

Francis J. Landry
(0006072)
WASSERMAN, BRYAN, LANDRY & HONOLD
300 Inns of Court Bldg.
405 N. Huron Street
Toledo, Ohio 43604
Telephone: (419) 243-1239
Facsimile: (419) 243-2719

Attorney for Plaintiff-Appellant
Gerald R. Walker

ORAL ARGUMENT REQUESTED

STATEMENT OF ISSUES FOR REVIEW

1. Whether the District Court erred in granting summary judgment in Appellee-Employer's favor, holding that Appellant Walker cannot claim disability status based on Appellee's perception that Walker was an alcoholic.

2. Whether, if employee Walker was required to make a showing that his perceived impairment (being an alcoholic) was "substantially limiting," the District Court erred in finding that Appellant did not present sufficient evidence to create a genuine issue of material fact as to whether Appellee perceived alcoholism to be a substantially limiting impairment.

3. Whether the District Court erred in finding that, even if Appellant had been able to establish a prima facie case of disability, the defendant articulated a legitimate non-discriminatory reason for its action and Appellant failed to show a triable issue exists as to whether Appellee's proffered explanation was a mere pretext.

* * * * *

development and application of a test as to showing perceived disability status under the Americans with Disabilities Act.

SUBSTANCE OF ARGUMENT

At the outset it should be noted that at page 8 of its Memorandum Opinion, the Court below adopted a three pronged test for finding a prima facie case of disability discrimination. The Court noted that Plaintiff must show (1) that he is an individual with a disability; (2) that he was performing his job at a level that met his employer's legitimate expectations; and (3) that he was discharged from the position under circumstances that raise a reasonable inference of unlawful discrimination. (R. 34, Memorandum Opinion, p. 8.)

In its Opinion, the Court focused on the first prong of this prima facie case test, finding ultimately that Plaintiff failed to show that he was an "individual with a disability." The Court then reasoned that Walker was excluded from coverage under the Americans With Disabilities Act and the parallel handicap discrimination statute in Ohio, Ohio Revised Code Section 4112.02 (a). The Court below further reasoned that since Plaintiff could not make out a prima facie case of disability discrimination, summary judgment must be granted to Appellee-employer on Walker's disability claims.

Walker contends that he may show that he is a member of the protected class created by the Americans With Disabilities Act, in this case, that he was perceived as having a disability by showing that he (1) has a physical and mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation; (2) has a physical and mental impairment that substantially limits major life activities only as a result of the

attitudes of others toward such impairment; or (3) has none of the impairments but is treated by a covered entity as having a substantially limiting impairment. See 29 C.F.R. Section 1630.2 (1). Part 1630 of the Code of Federal Regulations contains regulations to implement the equal employment provisions of the Americans With Disabilities Act. That part defines what is meant by the term "is regarded as having such an impairment." In the case at bar, Walker claims that he was not an alcoholic but that he was regarded as being an alcoholic. Thus, although he does not have such an impairment, he was treated by a covered entity, the employer in this case, as having such a substantially limiting impairment. It is respectfully submitted that the court below was consistent in its logic up to this point. In this case, Judge Katz correctly found the parties agree that the employer regarded Walker as having the impairment of alcoholism. However, Judge Katz then focused on whether the employer regarded Plaintiff's perceived alcoholism as substantially limiting one or more of his major life activities. At page 11 of its Memorandum Opinion, the District Court noted that Plaintiff had pointed to nothing in the record that indicated Defendant had considered alcoholism, per se, to be a substantially limiting impairment.

In a case under the parallel Rehabilitation Act, School Board of Nassau County, v. Arline, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed 2d, 307 (1987), the U.S. Supreme Court held that a school teacher who was terminated because of a condition of tuberculosis was covered under the "regarded as" prong because the school board in that case terminated her because of its fear of her alleged current contagiousness. There, the court emphasized that Congress had included this third prong in the definition because it was as concerned about the reaction of others to a person's impairment as it was about the direct affects of an impairment and upon the individual. The court noted that an exclusion under this

rationale would mean that those believed to have contagious diseases would never get the opportunity to have their condition evaluated in light of medical evidence. The court also noted that the Rehabilitation Act was designed to protect a woman who was crippled by arthritis who was denied a job simply because her college trustees thought normal students should not see her. In summary, the third prong of the definition was designed to protect an individual who has an impairment that in isolation may not substantially limit that persons functioning but becomes a limiting factor because of the reaction by others. The Supreme Court reasoned that by amending the definition of "Handicapped individual" to include not only those who are actually physically impaired, but who are also regarded as impaired, Congress acknowledged that society's accumulated fears about disabilities and disease are as handicapping as its physical limitations that flow from actual impairment. See School Board of Nassau County v. Arline, 480 U.S. 273, 282 at note 9 (1987).

It is respectfully submitted that the legislative history of the Americans With Disabilities Act makes clear that this rationale by the U.S. Supreme Court appropriately describes the purposes of the third prong of the definition of "disability" in the Americans With Disabilities Act. See S. Rep. No. 116, 101st. Cong., 1st Sess. at 23-24 (1989) (Senate Committee on Labor and Human Resources); H.R. Rep No. 485, Part 3, 101st. Cong., 2d Sess. at 30 (1990) (House Judiciary Report).

With respect to the "regarded as" prong, if an individual can show that an employer made an adverse employment decision based on fear or stereotype, the individual should have satisfied this prong as the definition of disability. For example, an employer may view a cosmetic disorder substantially limiting a person's ability to work. Such a person would be covered under the third prong of the

definition of "disability" because of the attitudes of others, even though the person with the cosmetic disorder did not view himself or herself as "impaired". See (S. Rep. No. 116 101st Cong., 1st Sess. at 24 (1989) Senate Committee on Human Resources); H. R. Rep. No. 485 part 2, 101st Cong., 2d Sess. at 53 (1990) (House Committee on Education and Labor). It is submitted that a person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under the third "regarded as" prong whether or not the person's physical or mental condition would be considered a disability under the first of second part of the definition. See H.R. Rep. No. 485, part 3, 101st Cong., 2d Sess. at 30 (1990) (House Judiciary Report).

It is respectfully submitted that District Court focused exclusively on Appellee's policies prohibiting alcohol abuse in order to determine that Walker was unable to point to anything showing that Appellee considered alcoholism to be a substantially limiting impairment. The Court reasoned that the policies pointed to by Walker pertained only to alcohol use as opposed to alcohol status. Because the ADA permits employers to take punitive action and/or discharge employees for misconduct related to alcohol use, the court's logic would bar any claim of perceived alcoholism in situations where companies have alcohol use company policies. Thus, the court's opinion sweeps with too broad a brush. This Court has in Taylor v. U.S. Postal Service, 946 F.2d 1214 (6th Cir. 1991), cautioned against a rule that would exclude perceived handicap claims and adopted a case by case analysis.

It is respectfully submitted that this court, in reviewing the grant of summary judgment should pay special attention to the exhibits attached to the Memorandum in Opposition to Defendant's Motion for Summary Judgment filed by Plaintiff on March 29, 1996. Clearly, Appellant Walker has presented deposition testimony that Appellee violated company policy

in not sending him for a blood/alcohol test. (R.26, Deposition of Robert Steingass at p. 10; R. 27, Deposition of Mark Verhoff at pp. 10-12). Moreover, there were long standing rumors circulating at the premises of employer that Walker was an alcoholic (R.28, Deposition of Daniel Kear at p. 15; R.30, Opposition of Plaintiff to Motion for Summary Judgment, Exhibit D). Moreover, documents attached to Plaintiff's Opposition to Defendant's Motion for Summary Judgment clearly show that the Appellee perceived him as an alcoholic in denial. Because the Appellee's officials were relying upon their own perceptions and objective evidence, they wondered what they would do if it was determined, through medical testing, that Walker was not an alcoholic. With this in mind, they sought to obtain an admission from him that he has been drinking in order to justify his termination. (R.30, Opposition by Plaintiff to Motion for Summary Judgment Exhibits F, G, H). Stated simply, the Appellee in this case confronted Walker on mere suspicions, sent him home and denied his request for blood/alcohol testing, while disparately treating another individual confronted on the same evening who they sent to Blanchard Valley Hospital for blood/alcohol testing. Moreover, with respect to Appellant Walker, the Appellee violated its own policy of referring individuals confronted with claims of improper alcohol use for testing. These facts, along with the exhibits indicating that the company viewed Walker as an alcoholic in denial clearly established the myth, stereotype or fear associated with the third "regarded as" prong and ought to be sufficient to allow Appellant Walker protected status as a person with a perceived disability under the Americans With Disabilities Act.

II. Whether, if employee Walker was required to make a showing that his perceived impairment (being an alcoholic) was substantially limiting, the District Court erred in

finding that Appellant did not present sufficient evidence to create a genuine issue of material fact as to whether Appellee perceived alcoholism to be a substantially limiting impairment.

STANDARD OF REVIEW

Review of a grant of summary judgment is a review de novo utilizing the same test used by the District Court to determine whether summary judgment is appropriate. See Deaton v. Montgomery County, Ohio, 989 F. 2d 885, 887 (6th Cir. 1983). The Court shall render summary judgment when there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion is made. See LaPointe v. UAW, Local 600, 8 F. 3d 376, 378 (6th Cir. 1993); United States v. TRW, Inc., 4 F. 3d 417, 423 (6th Cir. 1993); Maddox v. University of Tennessee, 62 F. 3d 843, 845 (6th Cir. 1995). In its memorandum opinion filed May 29, 1996, the Court below set forth the standard on Summary Judgment in an apparent proper fashion (R.34, Memorandum Opinion, pp. 5-6). Therefore, for purposes of the appeal under this issue, this Court's focus should be upon the facts and upon the lower court's development and application of a test showing perceived disability status under the Americans With Disabilities Act.

SUBSTANCE OF ARGUMENT

In the Court below, the Appellee-Employer relied upon two cases, Collings v. Longview Fiber Company, 63 F. 3d 828 (1995), and Maddox v. University of Tennessee, 62 F.3d 843 (6th Cir. 1995), in support of its assertion that Plaintiff cannot show pretext. The instant case, however, is distinguishable from Collings and Maddox, supra. In Collings, the Court granted summary judgment against

Plaintiff because he presented only conclusory assertions in an affidavit in support of his claim that his employer perceived him as having a drug problem. 62 F. 3d at 843. In Maddox, the officials who terminated the Plaintiff were not even aware of the fact that he was an alcoholic at the time that he was terminated. 62 F. 3d at 846.

In the case at bar by contrast, Walker has presented facts in addition to his own affidavit in support of his claim. He has presented the affidavit of a fellow employee who says that he was not under the influence of alcohol during his shift. (R. 30, Opposition by Plaintiff to Motion for Summary Judgment, Exhibit E). Walker has also presented deposition testimony that Consolidated Biscuit Company personnel violated company policy in not sending him for a blood/alcohol test. (R. 26, Deposition of Robert Steingass at p. 10; R. 27, Deposition of Mark Vehoff at pp. 10-12). He has presented deposition testimony and documents to support the claim of longstanding rumors, circulating at Consolidated Biscuit Company, that he was an alcoholic (R. 28, Deposition of Daniel Kear at p. 15; R. 30, Opposition by Plaintiff to Motion for Summary Judgment, Exhibit D). As noted in this Brief supra, documents have been presented clearly showing that Appellee's personnel perceived Walker as an alcoholic in denial (R. 30, Opposition by Plaintiff to Motion for Summary Judgment Exhibit G, H). It is respectfully submitted that even if Appellant Walker were properly required to demonstrate a genuine issue of material fact that the employer perceived his alcoholism as substantially limiting a major life activity of an employee, it is submitted that there is sufficient evidence to create such a genuine issue. It is also instructive to note that the alcohol and substance abuse policy attached as Exhibit B to Plaintiff's Opposition to the Motion for Summary Judgment states in pertinent part as follows:

6. EMPLOYEE ASSISTANCE

This policy is not for the purpose of discipline, but rather to provide a safe working environment. Our goal is to eliminate the problem, not punish an employee who need and wants help. . .Likewise, any employee subject to discharge for use of alcohol or controlled substance, who has an otherwise good work record, may be considered for suspension without pay provided they successfully complete an alcohol or substance abuse program; successful completion shall include any after care requirements including testing. (See R. 30, Opposition by Plaintiff to Motion for Summary Judgment, Exhibit B, p. 4).

This policy suggests that the employer viewed alcoholism as so serious as to afford its employees one chance at rehabilitation. In this case, Walker who had an unblemished record was not given the opportunity to be tested when confronted with allegations of alcoholism and was summarily terminated. It is submitted that the employer's attitude of "viewing Walker as an alcoholic in denial" led to his confrontation and his termination. The policies and the deposition testimony clearly establish a genuine issue as to

* * * * *

APPENDIX G

No. 3:95 CV 7398

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
July 3, 1996
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
TOLEDO

GERALD WALKER, *Plaintiff*,	) **JUDGE DAVID A.**) **KATZ**
v.	) **COMPLAINT WITH**) **JURY DEMAND**) **ENDORSED**
CONSOLIDATED BISCUIT CO., *Defendant*.	)))

I. PRELIMINARY STATEMENT

1. Plaintiff brings this action to redress injury done to him by the defendant's discriminatory treatment on

the basis of a perceived disability, in violation of the Americans with Disabilities Act of 1990, 42 U.S.C. §12201, et seq.

2. The jurisdiction of this Court is invoked pursuant to 42 U.S.C. 12201, et seq.

3. On oraboutt October 20, 1994, the plaintiff filed a complaint alleging discrimination based upon a perceived handicap with the Ohio Civil Rights Commission (OCRC) and the Equal Employment Opportunity Commission (EEOC).

4. On or about May 8, 1995, the EEOC issued a "right to sue" letter to the plaintiff.

II. PARTIES

5. Plaintiff is a citizen of the United States and a resident of Custar, Ohio, located in Wood County, Ohio, within this jurisdictional district and division. He suffers from a physical ailment known as Rosacea, a skin condition affecting the blood vessels of the skin covering the head and neck, which manifests itself in a condition causing an enlarged nose, dilated pores, and broken blood vessels over the cheeks and nose area. This physical condition does not substantially limit plaintiff's major life activities, but was treated by the defendant, plaintiff's former employer, as constituting such a limitation; or in the alternative, the physical condition is substantially limiting because of the attitude of the defendant toward his impairment. The plaintiff is an individual who was regarded as having a disability within the meaning of 42 U.S.C. §12101(2)(C).

6. The defendant, Consolidated Biscuit Company, is located in McComb, Ohio, Hancock county, Ohio, within this judicial district and division. The defendant is an employer under the Americans with Disabilities Act, 42 U.S.C. §12201, et seq., and employs more than twenty-five

employees. The defendant is a corporation licensed to do business in the State of Ohio.

III. COUNT ONE

7. Plaintiff began his employment with the defendant as a production worker in January of 1984. Subsequently, he was promoted into a supervisory position. He reported for work on May 2, 1994, as scheduled. Subsequently, he was approached by his supervisor who accused him of being under the influence of alcohol. Plaintiff denied that he had consumed any alcohol. Later, his supervisor against approached him and ordered him off the job because he was under the influence of alcohol. Plaintiff requested that he be allowed to submit to a blood alcohol test, as had been done for others in the defendant's employment, but such request was refused.

8. On or about May 4, 1994, plaintiff was called into the office of a vice president of the defendant company and was terminated on the basis that he had a "drinking problem". Plaintiff attempted to explain that he did not have an alcohol problem, but suffered from Rosacea, all to no avail.

9. The actions of the plaintiff's supervisor and the vice president of the defendant were within the scope of their authority as agents of the defendant corporation.

10. The defendant's termination of the plaintiff's employment was directly and proximately caused by the defendant's perception that the plaintiff suffered from a disability protected under the Americans with Disabilities Act, which perception was erroneous and unlawful.

11. As a result of plaintiff's intentional conduct, plaintiff has suffered severe economic loss, as well as pain and suffering.

12. Plaintiff further states that the actions of the

defendant and its agents were reckless by their indifference to the plaintiff's federally protected right not to be discriminated against based upon a perceived disability.

IV. COUNT TWO

13. Plaintiff reasserts all of the foregoing allegations and incorporates them herein by reference as if fully rewritten herein.

14. As a result of the defendant's actions as described above, the defendant has discriminated against plaintiff on the basis of a perceived handicap, in violation of Ohio Revised Code Section 4112.99.

15. As a result, plaintiff has lost his job, back pay, and applicable fringe benefits, and has otherwise been harmed, entitling him to compensatory damages.

V. PRAYER FOR RELIEF

WHEREFORE, plaintiff demands judgment against the defendant for the following:

A) Compensatory damages;
B) Reinstatement and/or future pay, back pay, and fringe benefits;
C) Punitive damages;
D) Pre-judgment interest;
E) Reasonable costs and attorney fees; and
F) Such other relief as the Court deems just and equitable, or to which the plaintiff is or would be entitled under his federal or pendent state claim.

Respectfully submitted,
BRITZ AND ZEMMELMAN
Attorneys for Plaintiff

/s/BY:_____

Norman G. Zemmelman (0009371)
414 N. Erie Street, Suite 100
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(419) 242-7415-Phone
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APPENDIX H

No. 3:95 CV 7398

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
July 27, 1996
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
TOLEDO

GERALD WALKER, *Plaintiff*,	) **JUDGE DAVID A.**) **KATZ**
v.	)
CONSOLIDATED BISCUIT CO., *Defendant*.	) **ANSWER OF**) **DEFENDANT**) **CONSOLIDATED**) **BISCUIT COMPANY**

For its answer to plaintiff's complaint, and separately stating its defenses thereto, defendant Consolidated Biscuit Company says that:

FIRST DEFENSE

1. It admits that plaintiff seeks relief pursuant to the Americans With Disabilities Act of 1990, 42 U.S.C. §12201, et seq., but it denies each and every other allegation in paragraph one of the complaint.

2. It admits the allegations in paragraph two of the complaint.

3. It admits the allegations in paragraph three of the complaint.

4. It admits the allegations in paragraph four of the complaint.

5. It admits, upon information and belief, that the plaintiff is a citizen of the United States and a resident of Custar, Wood County, Ohio, within this jurisdictional district; it further admits that plaintiff does not suffer from any physical condition which substantially limits his major life activities; but it denies each and every other allegation in paragraph five of the complaint.

6. It admits the allegations in paragraph six of the complaint.

7. It admits that plaintiff was hired by defendant on January 13, 1984; it further admits that plaintiff was sent home from work on or about May 2, 1994 because he was under the influence of alcohol; but it denies each and every other allegation in paragraph seven of the complaint.

8. It admits that plaintiff was terminated on or about May 4, 1994 for reporting to work under the influence of alcohol in violation of company policy, but it denies each and every other allegation in paragraph eight of the complaint.

9. It admits the allegations in paragraph nine of the complaint.

10. It denies the allegations in paragraph ten of the complaint.

11. It denies the allegations in paragraph eleven of the complaint.

12. It denies the allegations in paragraph twelve of the complaint.

13. It admits the restatement of allegations in paragraph thirteen of the complaint and, in response thereto, adopts by reference its responses in paragraphs one through twelve above as if fully rewritten herein.

14. It denies the allegations in paragraph fourteen of the complaint.

15. It denies the allegations in paragraph fifteen of the complaint.

SECOND DEFENSE

16. It denies each and every allegation in the complaint which has not herein above been specifically and expressly admitted to be true.

THIRD DEFENSE

17. All or portions of plaintiff's complaint fail to state claims upon which relief may be granted.

FOURTH DEFENSE

18. Defendant acted within its statutory authority pursuant to 42 U.S.C. §12114 in terminating plaintiff.

FIFTH DEFENSE

19. Plaintiff has failed to mitigate his damages.

WHEREFORE, defendant Consolidated Biscuit Company demands that the complaint be dismissed with

prejudice and that it be permitted to go hence without day and recover its costs expended herein, and such other relief as deemed appropriate by the court.

Respectfully submitted,

EASTMAN & SMITH

/s/_____
Robert J. Gilmer, Jr. (0002287)
Kimberly S. Stepleton (0039491)
One SeaGate, 24th Floor
P.O. Box 10032
Toledo, Ohio 43699-0032
Telephone: (419) 241-6000
Telecopier: (419) 247-1777

PROOF OF SERVICE

A copy of the foregoing **Answer of Defendant Consolidated Biscuit Company** has been mailed this 24th day of July, 1995, to Norman G. Zemmelman, Attorney for Plaintiff, 414 N. Erie St., Suite 100, Toledo, Ohio 43624.

/s/_____
Kimberly S. Stepleton
Attorney for Defendant
Consolidated Biscuit Company

APPENDIX I

No. 3:95 CV 7398

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
March 29, 1996
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
TOLEDO

GERALD WALKER, *Plaintiff,*	) **JUDGE DAVID A.**) **KATZ**
	) **MEMORANDUM IN**
	) **OPPOSITION TO**
	) **DEFENDANT'S**
v.	) **MOTION FOR**
	) **SUMMARY**
	) **JUDGMENT**
CONSOLIDATED BISCUIT CO., *Defendant.*	)) Norman Zemmelman
	) Supreme Ct. #0009371
	) BRITZ AND
	) ZEMMELMAN
	) 414 N. Erie St.,Ste 100
	) Toledo, OH 43624
	) (419) 242-7415-Phone
	) Counsel for Plaintiff

INTRODUCTION

This is a disability discrimination case. Plaintiff Gerald Walker (Walker) filed a two-count complaint against his former employer Consolidated Biscuit Company (CBC), alleging violations of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12201 et seq., and Ohio civil rights law, pursuant to 41 O.R.C. §4112.99, as a result of his termination from employment by CBC on or about May 4, 1994. CBC has filed a motion for summary judgment as to both of Walker's claims, contending that there is no genuine issue of material fact remaining for trial and that it is entitled to judgment as a matter of law. In this response, Walker contends that genuine issues of material fact remain for trial and that summary judgment must be denied.

EXHIBIT A

CONSOLIDATED BISCUIT CORP.
McComb, Ohio 45858
293-2911

1980

PLANT RULES AND REGULATIONS

The following rules are not a complete list of types of conduct that may lead to disciplinary action. These may be revised or amended as necessary.

SECTION A- Dischargeable Offenses

Any of these offenses may result in automatic discharge regardless of the previous record of an employee:

A-1. Willful insubordination or defiance of authority.
A-2. Abusing or intentionally damaging Company property or deliberately contributing to such abuse.
A-3. Fighting, hitting, or roughing up another person on Company premises.
A-4. Possessing or using firearms on Company premises.
A-5. Possessing, consuming, using, or being under the influence of intoxicating beverages, narcotics, hallucinogens, or marijuana on Company premises.
A-6. Possessing or using glass containers in the plant.
A-7. Willfully falsifying the job application form.
A-8. Falsifying Company records or insurance claim.
A-9. Theft of Company property or property of another employee.
A-10. Failing to clock in and out or punching another employee's clock card.
A-11. Leaving the plant without written advance permission of the Plant Manager during working time or paid rest periods.
A-12. Carrying, duplicating, or using without authorization,

keys to Company owned or leased buildings, vehicles or equipment.

A-13. Smoking in restricted areas or chewing gum or tobacco in work areas.

A-14. Being in a work area while wearing any type of jewelry, other than a wedding band with no stones in it.

A-15. Being in a work area while having items in a blouse or shirt pocket.

A-16. Failing to conform to state or federal food plant requirements.

A-17. Refusing to submit to a physical examination by a doctor selected and paid by the Company.

A-18. Failing to report to work or call in for two (2) consecutive working days.

A-19. Excessive unexcused absences.

A-20. Failing to abide by Company's safety rules, regulations and standards.

EXHIBIT B

Consolidated Biscuit Co.

STATEMENT OF POLICY ON DRUG AND ALCOHOL ABUSE

In order to ensure a safe and efficient drug and alcohol free workplace, and ensure compliance with Federal regulations, the following company policy has been adopted and will be observed by all employees.

USE PROHIBITED

No employee will use a Schedule I drug of the Schedule of Controlled Substance of the Drug Enforcement Agency or an amphetamine, narcotic or any other habit-forming drug except where permitted by the Federal Motor Carrier Safety Regulations.

The Schedule I drugs include: opiates, opium derivatives, marijuana, hallucinogenic substances, depressants, and stimulants. Except as indicated above, this means that the employee shall not consume any of these controlled substances while off duty or on duty. Any violation of this policy will result in discharge.

IMPAIRMENT PROHIBITED

No employee will report for work or will work impaired by any drug or controlled substance or alcohol. Impaired means under the influence of a substance such that the employee's motor senses (i.e. sight, hearing, balance, reaction, reflex) or judgment either are or may be presumed affected. An employee may use a substance administered by or under the

instructions of a physician, the employee will notify his supervisor prior to the start of his shift. Any violation of this policy will result in discharge.

POSSESSION PROHIBITED

No employee at any work site will possess any quantity of any unlawful controlled substance or alcohol. For any controlled substance that is lawfully prescribed i.e. which is administered under the instructions of a physician, the employee will notify his supervisor prior to the start of his shift, and comply with all company regulations on medications. "Work site" means any motor vehicle, office, building, yard or other property operated by the company, or any other location at which the employee's person, personal effects, motor vehicle or areas substantially entrusted to the control of the employee. Any violation of this policy will result in discharge.

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

GERALD WALKER, *Plaintiff,*	) **JUDGE DAVID A.**) **KATZ**
	)
	) **AFFIDAVIT OF**
v.	) **GERALD R.**) **WALKER**
	)
CONSOLIDATED BISCUIT CO., *Defendant.*	)) Norman Zemmelman) Supreme Ct. #0009371) BRITZ AND) ZEMMELMAN) 414 N. Erie St.,Ste 100) Toledo, OH 43624) (419) 242-7415-Phone) (419) 241-7818-FAX) Counsel for Plaintiff

STATE OF OHIO)
) SS:
COUNTY OF LUCAS)

I, Gerald R. Walker, having been first duly sworn according to law, state the following based upon my own information and belief:

1. I was employed by Consolidated Biscuit

Company (CBC) from January 13, 1984 until May 4, 1994.

2. On or about May 4, 1994, I was terminated from my employment at CBC because, I was told by Anthony Sabatino, the Vice-President of Operations for CBC, that I had a "drinking problem."

3. I drink alcohol on occasion, but I am not an alcoholic and do not suffer from a "drinking problem."

4. I do suffer from a skin condition known as Rosacea, which causes a reddening of the face, thin red lines due to enlarged blood vessels in the face, and swelling of the nose.

5. It is my belief that my Rosacea has caused my supervisor and co-workers at CBC to perceive me as an alcoholic.

6. For quite some time, I have been the subject of rumors, circulated by both management and non-management personnel at CBC, that I am an alcoholic.

7. Those rumors became so widespread that I spoke to Mr. Sabatino about them on three or four occasions. Each time, I denied being an alcoholic and denied that I had ever come to work while intoxicated. I never had a meeting to discuss these issues with Robert Oehler or Dan Kear.

8. Despite my continuing and persistent denials, the rumors and the perception by CBC supervisory personnel of me as an alcoholic continued.

9. On May 2, 1994, I reported for work as scheduled. My supervisor, Dan Kear, approached me and accused me of having come to work under the influence of alcohol. I denied that I had consumed any alcohol that evening, but Mr. Kear ultimately ordered me to leave work because he said I was under the influence of alcohol.

10. I requested a blood/alcohol test twice to show that I was not under the influence of alcohol. However, Mr. Kear would not send me for such a test. Instead, he sent me home and told me to get some rest.

11. Mr. Kear refused to send me for such a test despite the fact it is company policy to send employees for such tests, if they are suspected of being under the influence of alcohol while at work.

12. Indeed, on May 2, 1994, the same night that I was sent home, another employee on the third shift who was suspected of being under the influence of alcohol was sent for a blood/alcohol test.

13. I believe that if I had not been perceived as an alcoholic by CBC supervisory personnel, and, in particular, Mr. Kear, I would have been sent for a blood/alcohol test.

14. On May 2, 1994, I did not consume any alcohol prior to arriving at work and was not under the influence of alcohol at any time while at work on that date.

15. On May 2, 1994, I was suffering from a lack of sleep and from back pain when I arrived at work.

16. On May 2, 1994, Mark Verhoff was not present in the scheduling room when I spoke to Mark Palte and Dan Kear. In fact, I did not see Mr. Verhoff at all that evening.

17. On May 2, 1994, I did not bump into Dan Kear, although I was limping as a result of my sciatica, nor did I have trouble replacing the cap on my pen.

18. On May 2, 1994, I did go to a bar called the Red Eye after I was told to leave work. When Mr. Palte called, I spoke to him and gave him directions as to how to get to the Red Eye. I did not consume any alcohol that evening until after Mr. Palte arrived. He and I then drank three beers in approximately 1.5 hours.

19. Mr. Palte tried to convince me to go to CBC and admit that I had been drinking. I refused to do so because I had not been drinking.

20. After Mr. Palte and I finished talking, I went home. It is my understanding that he returned to work.

21. Over the next few days, and even after I had

been terminated, Mr. Palte continued to call me at home and ask me to speak to Mr. Sabatino so that I could admit I had been drinking and be forgiven. I refused to do so because I had not been drinking.

22. I was never asked to take a blood/alcohol test, during the ten and one-half years that I was employed at CBC, as a result of a suspicion that I was under the influence of alcohol while at work. In fact, during my employment at CBC, I was never written up for any violation of company disciplinary rules.

Further Affiant sayeth naught.

/s/_____
Gerald R. Walker

Sworn to before me and subscribed in my presence this 25th day of March, 1996.

/s/_____
Elsie R. Price
Notary Public

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

GERALD WALKER, *Plaintiff,*	) **JUDGE DAVID A.**) **KATZ**
v.	) **AFFIDAVIT OF**) **DAVID BROSE**
CONSOLIDATED BISCUIT CO., *Defendant.*	)) Norman Zemmelman) Supreme Ct. #0009371) BRITZ AND) ZEMMELMAN) 414 N. Erie St.,Ste 100) Toledo, OH 43624) (419) 242-7415-Phone) (419) 241-7818-FAX) Counsel for Plaintiff

STATE OF OHIO)
) SS:
COUNTY OF LUCAS)

I, David Brose, having been first duly sworn according to law, state the following based upon my own information and belief:

1. I have been employed by Consolidated Biscuit Company (CBC) since May 1987.

2. On or about May 2, 1994, I was working my job as a baker in cracker mixing on the third shift.

3. During the course of my work that evening, I encountered Gerald Walker, with whom I was acquainted.

4. I spoke to Mr. Walker for a few moments.

5. I did not believe that Mr. Walker was under the influence of alcohol in any way at the time that I spoke to him during my shift.

Further Affiant sayeth naught.

/s/_____
David Brose

Sworn to before me and subscribed in my presence this 28th day of March, 1996.

/s/_____
Elsie R. Price
Notary Public

EXHIBIT F

(Handwritten notes)

July 14, 1994

Dan:

Was talking this morning to Jim Appold about Jerry Walker. Jim said he had talked to you and you said that Jerry had admitted having a few drinks before coming into work the evening he was sent home.

We need something for our files that states that Jerry admitted to having the drinks. Could you please have whomever Jerry said that to, write this up and sign it. Thanks!

I'll be in next Tuesday evening, so you could give it to me then.

Paula Pond

July 19, 1994

Talked to Dan. He is positive he smelled liquor on Jerry's breath. Does not think Jerry admitted drinking to Mr. Palte -- thinks Jerry has consistently denied drinking that evening.

P.P.

EXHIBIT G

M E M O

CONSOLIDATED BISCUIT CO.

TO: Jim Appold

FROM: Paula Pond

SUBJECT: Jerry Walker/Termination

Jerry Walker came in to see me today. He denies being under the influence of alcohol during working hours at any time during his ten year work history at CBC. When I noted that he had been observed by more than one person to be impaired on the evening in question, he stated that he was limping from sciatic nerve pain and had very little sleep before coming in for his shift.

Jerry said that he told Dan Kear that he would voluntarily go into Blanchard Valley Hospital for a blood alcohol test but Dan said it wasn't necessary and to just go home and get some rest. He now wishes that he had had the test on his own so he could prove his case. He feels that there are false rumors circulating that he has a drinking problem and that this influenced Dan Kear. He also feels he was made an example of because of the union election. He cited people coming to work under the influence of drugs and nothing has happened to them.

Jerry noted that he has an excellent attendance record and has no DUI driving citations contrary to what one might expect from an alcoholic. He admitted to drinking a 12 pack of beer

on a week-end and occasionally stopping at the VFW in McComb for a couple of beers at the end of third shift. He said that the rumors that he is a heavy drinker in local bars are not true.

Jerry stated that he would agree to an alcohol assessment at the Lincoln Center in order to be considered for re-hire. I talked to John Philbin about this after Jerry had left, and John contacted the Lincoln Center to try to get an idea of their success rate during assessment in getting a person in total denial to admit their alcohol problem. The Lincoln Center will be calling John back on Tuesday, July 5th.
The question to you would be, do we want to go ahead with an assessment for Jerry and would we re-hire him if he successfully completed a rehab program. If the results were negative for chemical dependency, what would we do? John feels that the termination would hold up legally because we have witnesses to prove that he was impaired at the time he was terminated.

cc: John Philbin

EXHIBIT H

Memo to Jerry Walker's file:

Joyce Walker Jerry's wife stopped by this afternoon June 13, 1994 to deliver a check for COBRA. She repeated Jerry's story that he had only slept a few hours and was suffering from a sacroiliac problem. Also that he was not impaired when he returned home. It has been my understanding that Mark Palte located him in a much more impaired state later that same morning. Mrs. Walker appears to be a very nice well intentioned wife who is as much in denial of Jerry's dependence as Jerry.

APPENDIX J

RELEVANT STATUTES

AMERICANS WITH DISABILITIES ACT
42 U.S.C. § 12101 - 42 U.S.C. § 12117

42 USCS § 12101

§12101. Congressional findings and purposes

(a) Findings. The Congress finds that –

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal

basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) **Purpose.** It is the purpose of this Act –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

(July 26, 1990, P.L. 101-336, § 2, 104 Stat. 328.)

§ 12102. Definitions

As used in this Act:

(1) Auxiliary aids and services. The term "auxiliary aids and services" includes–

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or

devices; and

(D) other similar services and actions.

(2) Disability. The term "disability" means, with respect to an individual–

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State. The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(July 26, 1990, P.L. 101-336, § 3, 104 Stat. 329.)

EMPLOYMENT

§ 12111. Definitions

As used in this title:

(1) Commission. The term "Commission" means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(2) Covered entity. The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee. The term "employee" means an individual

employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer. (A) In general. The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions. The term "employer" does not include–

(I) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(C) of the Internal Revenue Code of 1986.

(6) Illegal use of drugs. (A) In general. The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs. The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 USCS § 812].

(7) Person, etc. The terms "person", "labor

organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(8) Qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, his description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation. The term "reasonable accommodation" may include–

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position; acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters and other similar accommodations for individuals with disabilities.

(10) Undue hardship. (A) In general. The term "undue hardship" means an action requiring significant difficulty or expense when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered. In determining whether an accommodation would impose an undue hardship

on a covered entity, factors to be considered include–

(i) the nature and cost of the accommodation needed under this Act;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

(July 26, 1990, P.L. 101-336, Title I, § 101, 104 Stat. 330; Nov. 21, 1991, P.L. 102-166, Title I, $ 109(a), 105 Stat. 1077.)

§12112. Discrimination

(a) General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction. As used in subsection (a), the term "discriminate" includes–

(1) limiting, segregating, or classifying a job

applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration–

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is know to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or

applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries. (1) In general. It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation. (A) Presumption. If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception. This section shall not apply

with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination. For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on–

(i) the interrelation of operations;
(ii) the common management;
(iii) the centralized control of labor relations; and
(iv) the common ownership or financial control,

of the employer and the corporation.

(d) Medical examinations and inquiries. (1) In general. The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) Preemployment. (A) Prohibited examination or inquiry. Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry. A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination. A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if–

(A) all entering employees are subjected to

such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that–

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this Act shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this title.

(4) Examination and inquiry. (A) Prohibited examinations and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries. A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make

inquiries into the ability of an employee to perform job-related functions.

(C) Requirement. Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).
(July 26, 1990, P.L. 101-336, Title I, § 102, 104 Stat. 331; Nov. 21, 1991, P.L. 102-166, Title I, $ 109(b)(2), 105 Stat. 1077.)

§12113. Defenses

(a) In general. It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title.

(b) Qualification standards. The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Religious entities. (1) In general. This title shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement. Under this title, a religious organization may require that all applicants and employees conform to the religious tenets of such

organization.

(d) List of infectious and communicable diseases.

(1) In general. The Secretary of Health and Human Services, not later than 6 months after the date of enactment of this Act [enacted July 26, 1990], shall–

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissability to the general public.

Such list shall be updated annually.

(2) Applications. In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction. Nothing in this Act shall be construed to preempt. modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or

communicable diseases and the modes of transmissability published by the Secretary of Health and Human Services. (July 26, 1990, P.L. 101-336, Title I, § 103, 104 Stat. 333.)

§ 12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability. For purposes of this title, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction. Nothing in subsection (a) shall be construed to exclude as a qualified individual with a disability an individual who–

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity. A covered entity–

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that–

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such

regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing. (1) In general. For purposes of this title, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction. Nothing in this title shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees. Nothing in this title shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to–

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) to remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c).

(July 26, 1990, P.L. 101-336, Title I, § 104, 104 Stat. 334.)

§12115. Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered under this title shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions

of this Act, in the manner prescribed by section 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-10).
(July 26, 1990, P.L. 101-336, Title I, § 105, 104 Stat. 336.)

§12116. Regulations
Not later than 1 year after the date of enactment of this Act [enacted July 26, 1990], the Commission shall issue regulations in an accessible format to carry out this title in accordance with subchapter II of chapter 5 of title 5, United States Code [5 USCS §§ 551 et seq.].
(July 26, 1990, P.L. 101-336, Title I, § 106, 104 Stat. 336.)

§ 12117. Enforcement
(a) Powers, remedies, and procedures. The powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9) shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this Act, or regulations promulgated under section 106 [42 USCS § 12116], concerning employment.
(b) Coordination. The agencies with enforcement authority for actions which allege employment discrimination under this title and under the Rehabilitation Act of 1973 shall develop procedures to ensure that administrative complaints filed under this title and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this title and the Rehabilitation Act of 1973. The Commission, the Attorney

General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this title and Rehabilitation Act of 1973 not later than 18 months after the date of enactment of this Act [enacted July 26, 1990].
(July 26, 1990, P.L. 101-336, Title I, § 107, 104 Stat. 336.)

OHIO REVISED CODE
§ 4112.02 AND § 4112.99

§4112.02 Unlawful discriminatory practices.

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, sex, national origin, handicap, age or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

(B) For an employment agency or personnel placement service, because of race, color, religion, sex, national origin, handicap, age, or ancestry, to do any of the following:

(1) Refuse or fail to accept, register, classify properly, or refer for employment, or otherwise discriminate against any person;

(2) comply with a request from an employer for referral of applicants for employment if the request directly or indirectly indicates that the employer fails to comply with the provisions of sections 4112.01 to 4112.07 of the Revised Code.

(C) For any labor organization to do any of the following:

(1) Limit or classify its membership on the basis of race, color, religion, sex, national origin, handicap, age, or ancestry;

(2) Discriminate against, limit the employment opportunities of, or otherwise adversely affect the employment status, wages, hours, or employment conditions

of any person as an employee because of race, color, religion, sex, national origin, handicap, age or ancestry.

(D) For any employer, labor organization, or joint labor-management committee controlling apprentice training programs to discriminate against any person because of race, color, religion, sex, national origin, handicap, or ancestry in admission to, or employment in, any program established to provide apprentice training.

(E) Except where based on a bona fide occupational qualification certified in advance by the commission, for any employer, employment agency, personnel placement service, or labor organization, prior to employment or admission to membership, to do any of the following:

(1) Elicit or attempt to elicit any information concerning the race, color, religion, sex, national origin, handicap, age, or ancestry of an applicant for employment or membership;

(2) Make or keep a record of the race, color, religion, sex, national origin, handicap, age, or ancestry of any applicant for employment or membership;

(3) Use any form of application for employment or personnel or membership blank, seeking to elicit information regarding race, color, religion, sex, national origin, handicap, age, or ancestry; but an employer holding a contract containing a nondiscrimination clause with the government of the United States, or any department or agency of that government, may require an employee or applicant for employment to furnish documentary proof of United States citizenship and may retain that proof in the employer's personnel records and may use photographic or fingerprint

identification for security purposes;

(4) Print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification, or discrimination, based upon race, color, religion, sex, national origin, handicap, age, or ancestry;

(5) Announce or follow a policy of denying or limiting, through a quota system or otherwise, employment or membership opportunities of any group because of the race, color, religion, sex, national origin, handicap, age, or ancestry of that group;

(6) Utilize in the recruitment or hiring of persons any employment agency, personnel placement service, training school or center, labor organization, or any other employee-referring source known to discriminate against persons because of their race, color, religion, sex, national origin, handicap, age, or ancestry.

(F) For any person seeking employment to publish or cause to be published any advertisement that specifies or in any manner indicates that person's race, color, religion, sex, national origin, handicap, age, or ancestry, or expresses a limitation or preference as to the race, color, religion, sex, national origin, handicap, age, or ancestry of any prospective employer.

(G) For any proprietor or any employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, national origin, handicap, age, or ancestry, the full enjoyment of the accommodations, advantages, advantages, facilities, or privileges of the place of public accommodation.

(H) For any person to do any of the following:

(1) Refuse to sell, transfer, assign, rent, lease, sublease, or finance housing accommodations, refuse to negotiate for the sale or rental of housing accommodations, or otherwise deny or make unavailable housing accommodations because of race, color, religion, sex, familiar status, ancestry, handicap, or national origin;

(2) Represent to any person that housing accommodations are not available for inspection, sale, or rental, when in fact they are available, because of race, color, religion, sex, familial status, ancestry, handicap, or national origin;

(3) Discriminate against any person in the making or purchasing of loans or the provision of other financial assistance for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations, or any person in the making or purchasing of loans or the provision of other financial assistance that is secured by residential real estate, because of race, color, religion, sex, familial status, ancestry, handicap, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located, provided that the person, whether an individual, corporation, or association or any type, lends money as one of the principal aspects or incident to the person's principal business and not only as a part of the purchase price of an owner-occupied residence the person is selling nor merely casually or occasionally to a relative or friend;

(4) Discriminate against any person in the terms or conditions of selling, transferring, assigning, renting, leasing, or subleasing any housing accommodations or in furnishing

facilities, services, or privileges in connection with the ownership, occupancy, or use of any housing accommodations, including the sale of fire, extended coverage, or homeowners insurance, because of race, color, religion, sex, familial status, ancestry, handicap, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located;

(5) Discriminate against any person in the terms or conditions of any loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations because of race, color, religion, sex, familial status, ancestry, handicap, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located;

(6) Refuse to consider without prejudice the combined income of both husband and wife for the purpose of extending mortgage credit to a married couple or either member of a married couple;

(7) Print, publish, or circulate any statement or advertisement, or make or cause to be made any statement or advertisement, relating to the sale, transfer, assignment, rental, lease, sublease, or acquisition of any housing accommodations, or relating to the loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations, that indicates any preference, limitation, specification, or discrimination based upon race, color, religion, sex, familial status, ancestry, handicap, or national origin, or an intention to make any such preference,

limitation, specification, or discrimination;

(8) Except as otherwise provided in division (H)(8) or (17) of this section, make any inquiry, elicit any information, make or keep any record, or use any form of application containing questions or entries concerning race, color, religion, sex, familial status, ancestry, handicap, or national origin in connection with the sale or lease of any housing accommodations or the loan of any money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations. Any person may make inquiries, and make and keep records, concerning race, color, religion, sex, familial status, ancestry, handicap, or national origin for the purpose of monitoring compliance with this chapter.

(9) Include in any transfer, rental, or lease of housing accommodations any restrictive covenant, or honor or exercise, or attempt to honor or exercise, any restrictive covenant;

(10) Induce or solicit, or attempt to induce or solicit, a housing accommodations listing, sale, or transaction by representing that a change has occurred or may occur with respect to the racial, religious, sexual, familial status, or ethnic composition of the block, neighborhood, or other area in which the housing accommodations are located, or induce or solicit, or attempt to induce or solicit, a housing accommodations listing, sale or transaction by representing that the presence or anticipated presence of persons of any race, color, religion, sex, familial status, ancestry, handicap, or national origin, in the block, neighborhood, or other area will or may have results including, but not limited to, the following:

(a) The lowering of property values;

(b) A change in the racial, religious, sexual, familial status, or ethnic composition of the block, neighborhood, or other area;

(c) An increase in criminal or antisocial behavior in the block, neighborhood, or other area;

(d) A decline in the quality of the schools serving the block, neighborhood, or other area.

(11) Deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting housing accommodations, or discriminate against any person in the terms or conditions of that access, membership, or participation, on account of race, color, religion, sex, familial status, national origin, handicap, or ancestry;

(12) Coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person's having exercised or enjoyed or having aided or encouraged any other person in the exercise of enjoyment of, any right granted or protected by division (H) of this section;

(13) Discourage or attempt to discourage the purchase by a prospective purchaser of housing accommodations, by representing that any block, neighborhood, or other area has undergone or might undergo a change with respect to its religious, racial, sexual, familial status, or ethnic composition;

(14) Refuse to sell, transfer, assign, rent, lease, sublease, or finance or otherwise deny or withhold, a burial lot from any person because of the race, color, sex, familial status, age, ancestry, handicap, or national origin of any

prospective owner or user of the lot;

(15) Discriminate in the sale or rental of, or otherwise make unavailable or deny, housing accommodations to any buyer or renter because of a handicap of any of the following:

(a) The buyer or renter;

(b) A person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available;

(c) Any individual associated with the person described in division (H)(15)(b) of this section.

(16) Discriminate in the terms, conditions, or privileges of the sale or rental of housing accommodations to any person or in the provision of services or facilities to any person in connection with the housing accommodations because of a handicap of any of the following:

(a) That person;

(b) A person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available;

(c) Any individual associated with the person described in division (H)(16)(b) of this section.

(17) Except as otherwise provided in division (H)(17) of this section, make an inquiry to determine whether an applicant for the sale or rental of housing accommodations, a person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available, or any individual associated with that person has a handicap, or make an inquiry to determine the nature or severity of a handicap of the applicant or such a person or individual. The following inquiries may be made of all

applicants for the sale or rental of housing accommodations, regardless of whether they have handicaps:

(a) An inquiry into an applicant's ability to meet the requirements of ownership or tenancy;

(b) An inquiry to determine whether an applicant is qualified for housing accommodations available only to persons with handicaps or persons with a particular type of handicap;

(c) An inquiry to determine whether an applicant is qualified for a priority available to persons with handicaps or persons with a particular type of handicap;

(d) An inquiry to determine whether an applicant currently uses a controlled substance in violation of section 2925.11 of the Revised Code or a substantively comparable municipal ordinance;

(e) An inquiry to determine whether an applicant at any time has been convicted of or pleaded guilty to any offense, an element of which is the illegal sale, offer to sell, cultivation, manufacture, other production, shipment, transportation, delivery, or other distribution of a controlled substance.

(18)(a) Refuse to permit, at the expense of a handicapped person, reasonable modifications of existing housing accommodations that are occupied or to be occupied by the handicapped person, if the modifications may be necessary to afford the handicapped person full enjoyment of the housing accommodations. This division does not preclude a landlord of housing accommodations that are rented or to be rented to a handicapped tenant from conditioning permission for a proposed modification upon the handicapped tenant's doing one or more of the following:

(i) Providing a reasonable description of the proposed modification and reasonable assurances that the proposed modification will be made in a workmanlike manner and that any required building permits will be obtained prior to the commencement of the proposed modification;

(ii) Agreeing to restore at the end of the tenancy the interior of the housing accommodations to the condition they were in prior to the proposed modification, but subject to reasonable wear and tear during the period of occupancy, if it is reasonable for the landlord to condition permission for the proposed modification upon the agreement;

(iii) Paying into an interest-bearing escrow account that is in the landlord's name, over a reasonable period of time, a reasonable amount of money not to exceed the projected costs at the end of the tenancy of the restoration of the interior of the housing accommodations to the condition they were in prior to the proposed modification, but subject to reasonable wear and tear during the period of occupancy, if the landlord finds the account reasonably necessary to ensure the availability of funds for the restoration work. The interest earned in connection with an escrow account described in this division shall accrue to the benefit of the handicapped tenant who makes payments into the account.

(b) A landlord shall not condition permission for a proposed modification upon a handicapped tenant's payment of a security deposit that exceeds the customarily required security deposit of all tenants of the particular housing accommodations.

(19) Refuse to make reasonable accommodations in rules, policies, practices, or services when necessary to afford a handicapped person equal opportunity to use and enjoy a

dwelling unit, including associated public and common use areas;

(20) Fail to comply with the standards and rules adopted under division (A) of section 3781.11[378.11.1] of the Revised Code;

(21) Discriminate against any person in the selling, brokering, or appraising of real property because of race, color, religion, sex, familial status, ancestry, handicap, or national origin;

(22) Fail to design and construct covered multifamily dwellings for first occupancy on or after June 30, 1992, in accordance with the following conditions:

(a) The dwellings shall have at least one building entrance on an accessible route, unless it is impractical to do so because of the terrain or unusual characteristics of the site.

(b) With respect to dwellings that have a building entrance on an accessible route, all of the following apply:

(i) The public use areas and common use areas of the dwellings shall be readily accessible to and usable by handicapped persons.

(ii) All the doors designed to allow passage into and within all premises shall be sufficiently wide to allow passage by handicapped persons in wheelchairs.

(iii) All premises within covered multifamily dwelling units shall contain an accessible route into and through the dwelling; al light switches, electrical outlets, thermostats, and other environmental controls within such units shall be in accessible locations; the bathroom walls within such unit shall contain reinforcements to allow later installation of grab bars; and the kitchens and bathrooms within such units shall be designed and constructed in a

manner that enables an individual in a wheelchair to maneuver about such rooms.

For purposes of division (H)(22) of this section, "covered multifamily dwellings" means buildings consisting of four or more units if such buildings have one or more elevators and ground floor units in other buildings consisting of four or more units.

(I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

(J) For any person to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, to obstruct or prevent any person from complying with this chapter or any order issued under it, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice.

(K)(1) Nothing in division (H) of this section shall bar any religious or denominational institution or organization, or any nonprofit charitable or educational organization that is operated, supervised, or controlled by or in connection with a religious organization, from limiting the sale, rental, or occupancy of housing accommodations that it owns or operated for other than a commercial purpose to persons of the same religion, or from giving preference in the sale, rental, or occupancy of such housing accommodations to persons of the same religion, unless membership in the

religion is restricted on account of race, color, or national origin.

(2) Nothing in division (H) of this section shall bar any bona fide private or fraternal organization that, incidental to its primary purpose, owns or operates lodings for other than a commercial purpose, from limiting the rental or occupancy of the lodgings to its members or from giving preference to its members.

(3) Nothing in division (H) of this section limits the applicability of any reasonable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy housing accommodations., Nothing in that division prohibits the owners or managers of housing accommodations from implementing reasonable occupancy standards based on the number and size of sleeping areas or bedrooms and the overall size of a dwelling unit, provided that the standards are not implemented to circumvent the purposes of this chapter and are formulated, implemented, and interpreted in a manner consistent with this chapter and any applicable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy housing accommodations.

(4) Nothing in division (H) of this section requires that housing accommodations be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

(5) Nothing in division (H) of this section pertaining to discrimination on the basis of familial status shall be construed to apply to any of the following:

(a) Housing accommodations provided under any state or federal program that have been determined under the "Fair Housing Amendments Act of 1988", 102 Stat. 1623, 42 U.S.C.A. 3607, as amended, to be specifically designed and operated to assist elderly persons;

(b) Housing accommodations intended for and solely occupied by persons who are sixty-two years of age or older;

(c) Housing accommodations intended and operated for occupancy by at least one person who is fifty-five years of age or older per unit, as determined under the "Fair Housing Amendments Act of 1988", 102 Stat. 1623, 42 U.S.C.A. 3607, as amended.

(L) Nothing in divisions (A) to (E) of this section shall be construed to require a handicapped person to be employed or trained under circumstances that would significantly increase the occupational hazards affecting either the handicapped person, other employees, the general public, or the facilities in which the work is to be performed, or to require the employment or training of a handicapped person in a job that requires the handicapped person routinely to undertake any task, the performance of which is substantially and inherently impaired by the handicapped person's handicap.

(M) Nothing in divisions (H)(1) to (18) of this section shall be construed to require any person selling or renting property to modify the property in any way or to exercise a higher degree of care for a person having a handicap, to relieve any handicapped person of any obligation generally imposed on all persons regardless of handicap in a written lease, rental agreement, or contract of purchase or

sale, or to forbid distinctions based on the inability to fulfill the terms and conditions, including financial obligations, of the lease, agreement, or contract.

(N) An aggrieved individual may enforce the individual's rights relative to discrimination on the basis of age as provided for in this section by instituting a civil action, within two years after the alleged unlawful discriminatory practice occurred, in any court with jurisdiction for any legal or equitable relief that will effectuate the individual's rights.

A person who files a civil action under this division is barred, with respect to the practices complained of, from instituting a civil action under section 4112.14 of the Revised Code and from filing a charge with the commission under section 4112.05 of the Revised Code.

(O) With regard to age, it shall not be an unlawful discriminatory practice and it shall not constitute a violation of division (A) of section 4112.14 of the Revised Code for any employer, employment agency, joint labor-management committee controlling apprenticeship training programs, or labor organization to do any of the following:

(1) Establish bona fide employment qualifications reasonably related to the particular business or occupation that may include standards for skill, aptitude, physical capability, intelligence, education, maturation, and experience;

(2) Observe the terms of a bona fide seniority system or any bona fide employee benefit plan, including, but not limited to, a retirement, pension, or insurance plan, that is not a subterfuge to evade the purposes of this section. However, no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary

retirement of any individual, because of the individual's age except as provided for in the "Age Discrimination in Employment Act Amendment of 1978," 92 Stat. 189, 29 U.S.C.A. 623, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 623, as amended.

(3) Retire an employee who has attained sixty-five years of age who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policy making position, if the employee I entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of those plans, of the employer of the employee, which equals, in the aggregate, at least forty-four thousand dollars, in accordance with the conditions of the "Age Discrimination in Employment Act Amendment of 1978," 92 Stat. 189, 29 U.S.C.A. 631, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 631, as amended;

(4) Observe the terms of any bona fide apprenticeship program if the program I registered with the Ohio apprenticeship council pursuant to sections 4111.25 to 4111.30 of the Revised Code and is approved by the federal committee on apprenticeship of the United States department of labor.

(P) Nothing in this chapter prohibiting age discrimination and nothing in division (A) of section 41112.14 of the Revised Code shall be construed to prohibit the following:

(1) The designation of uniform age the attainment of which is necessary for public employees to receive pension

or other retirement benefits pursuant to Chapter 145., 742., 3307., 3309., or 5505. of the Revised Code;

(2) The mandatory retirement of uniformed patrol officers of the state highway patrol as provided in section 5505.16 of the Revised Code;

(3) The maximum age requirements for appointment as a patrol officer in the state highway patrol established by section 5503.01 of the Revised Code;

(4) The maximum age requirements established for original appointment to a police department or fire department in sections 124.41 and 124.42 of the Revised Code;

(5) Any maximum age not in conflict with federal law that may be established by a municipal charter, municipal ordinance, or resolution of a board of township trustee for original appointment as a police officer or fire fighter;

(6) Any mandatory retirement provision not in conflict with federal law of a municipal charter, municipal ordinance, or resolution of a board of township trustees pertaining to police officers and fire fighters;

(7) Until January 1, 1994, the mandatory retirement of any employee who has attained seventy years of age and who is serving under a contract of unlimited tenure, or similar arrangement providing for unlimited tenure, at an institution of higher education as defined in the "Education Amendments of 1980," 94 Stat. 1503, 20 U.S.C.A. 1141(a).

(Q)(1)(a) Except as provided in division (Q)(1)(b) of this section, for purposes of divisions (A) to (E) of this section, a handicap does not include any physiological disorder or condition, mental or psychological disorder, or disease or condition caused by an illegal use of any controlled substance by an employee, applicant, or other person, if an

employer, employment agency, personnel placement service, labor organization, or joint labor-management committee acts on the basis of that illegal use.

(b) Division (Q)(1)(a) of this section does not apply to an employee, applicant, or other person who satisfies any of the following:

(i) The employee, applicant, or other person has successfully completed a supervised drug rehabilitation program and no longer is engaging in the illegal use of any controlled substance, or the employee, applicant, or other person otherwise successfully has been rehabilitated and no longer is engaging in that illegal use.

(ii) The employee, applicant, or other person is participating in a supervised drug rehabilitation program and no longer is engaging in the illegal use of any controlled substance.

(iii) The employee, applicant, or other person is erroneously regarded as engaging in the illegal use of any controlled substance, but the employee, applicant, or other person is not engaging in that illegal use.

(2) Divisions (A) to (E) of this section do not prohibit an employer, employment agency, personnel placement service, labor organization, or joint labor-management committee from doing any of the following:

(a) Adopting or administering reasonable policies or procedures, including, but not limited to, resting for the illegal use of any controlled substance, that are designed to ensure that an individual described in division (Q)(1)(b)(i) or (ii) of this section no longer is engaging in the illegal use of any controlled substance;

(b) Prohibiting the illegal use of controlled

substances and the use of alcohol at the workplace by all employees;

(c) Requiring that employees not be under the influence of alcohol or not be engaged in the illegal use of any controlled substance at the workplace;

(d) Requiring that employees behave in conformance with the requirements established under "The Drug-Free Workplace Act of 1988," 102 Stat. 4304, 41 U.S.C.A. 701, as amended;

(e) Holding an employee who engages in the illegal use of any controlled substance or who is an alcoholic to the same qualification standards for employment or job performance, and the same behavior, to which the employer, employment agency, personnel placement service, labor organization, or joint labor-management committee holds other employees, even if any unsatisfactory performance or behavior is related to an employee's illegal use of a controlled substance or alcoholism;

(f) Exercising other authority recognized in the "Americans with Disabilities Act of 1990," 104 Stat. 327, 42 U.S.C.A. 12101, as amended, including, but not limited to, requiring employees to comply with any applicable federal standards.

(3) For purposes of this chapter, a test to determine the illegal use of any controlled substance does not include a medical examination.

(4) Division (Q) of this section does not encourage, prohibit, or authorize, and shall not be construed as encouraging, prohibiting, or authorizing, the conduct of testing for the illegal use of any controlled substance by employees, applicants, or other persons, or the making of

employment decisions based on the results of that type of testing.

HISTORY: 128 v 12 (eff 7-29-59); 129v 1694 (Eff 10-24-61); 131 v 982 (Eff 10-30-65); 133 v H 47(Eff 10-24-69); 133 v H 432 (Eff 11-12-69); 135 v H 610(Eff 12-19-73); 136 v H 151 (Eff 1-14-76); 136 v S 162 (Eff 7-23-76); 138 v H 230 (Eff 11-13-79); 138 v S 367 (Eff 3-23-81); 142 v H 5 (Eff 9-28-87); 143 v H 314 (Eff 5-31-90); 144 v H 321 (Eff 6-30-92); 146 v S 162 (Eff 10-29-95); 146 v S 2 (Eff 7-1-96); 146 v H 350. Eff 1-27-97.

The provisions of § 7 of HB 350 (146v --) read in part as follows:

SECTION 7.* * * Section 4112.02 of the Revised Code, as amended in Section 1 of this act, is presented in this act as a composite of the section as amended by both Am. Sub. S.B. 2 and Am. Sub. S.B. 162 of the 121st General Assembly, with the new language of neither of the acts shown in capital letters. This is in recognition of the principle stated in division (B) of section 1.52 of the Revised Code that such amendments are to be harmonized where not substantively irreconcilable and constitutes a legislative finding that such is the resulting version in effect prior to the effective date of this act.

§ 4112.99 Civil remedies for violation.

Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief. A civil action commenced pursuant to this section

shall be brought within two years after the alleged unlawful discriminatory practice occurred. The period of limitation specified in this section for purposes of a civil action authorized by this section does not affect any other period of limitation that is specified in another section of this chapter for purposes of a distinct civil action authorized by that other section, including, but not limited to, a civil action authorized by division (N) of section 4112.02, division (D) of section 4112.021 [4112.02.1], division (A) of section 4112.051 [4112.05.1], or division (B) of section 4112.14 of the Revised Code.

HISTORY: 128 v 12 (Eff 7-29-59); 133 v H 432 (Eff 11-12-69); 136 v S 162 (Eff 7-23-76); 142 v H 5 (Eff 9-28-87); 146 v H 350. Eff 1-27-97.

29 C.F.R. § 1630.2(1)

* * * * *

(l) *Is regarded as having such an impairment* means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

(2)

Supreme Court, U.S.
FILED
NOV 12 1997
CLERK

No. 97-660

In The

Supreme Court of the United States

October Term, 1997

GERALD R. WALKER,

Petitioner,

vs.

CONSOLIDATED BISCUIT COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Court review the standards for establishing a *prima facie* case of disability discrimination in a case in which the Petitioner failed to prove he was disabled, failed to rebut evidence that he was discharged for a legitimate nondiscriminatory reason, and where there exists no true conflict among the circuits in the statement of the *prima facie* case?

2. Should the Court review the Sixth Circuit's determination that, based upon the evidence before it, Petitioner failed to produce evidence sufficient to withstand summary judgment regarding the reason for his termination where the asserted error consists only of a claimed misapplication of a properly stated rule of law?

3. Should the Court review the Sixth Circuit's determination that Petitioner did not offer sufficient evidence to rebut Consolidated's legitimate, nondiscriminatory reason for terminating Petitioner where the asserted error consists only of a claimed misapplication of a properly stated rule of law?

LIST OF PARTIES

Respondent Consolidated Biscuit Company is an Ohio Corporation headquartered in Ohio. There are no parent or non-wholly owned subsidiary companies to be listed pursuant to Rule 29.6.

The parties are Gerald R. Walker, Petitioner, and Consolidated Biscuit Company, Respondent.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE 2

ARGUMENT 4

A. QUESTION ONE: PETITIONER'S ASSERTION THAT THE SIXTH CIRCUIT STATED THE WRONG *PRIMA FACIE* TEST DOES NOT WARRANT SUPREME COURT REVIEW 4

1. The Sixth Circuit Has Repeatedly Stated The Correct *Prima Facie* Test 4

2. Regardless Of How The *Prima Facie* Case Is Stated, Respondent Has Not Met It.. 6

3. Even If Petitioner Had Set Forth A *Prima Facie* Case Of Disability Discrimination, His Case Nonetheless Fails On Summary Judgment 7

B. QUESTIONS TWO AND THREE: THERE IS NO REASON FOR THIS COURT TO REVISIT THE SIXTH CIRCUIT'S FINDING REGARDING WHETHER PETITIONER SUBMITTED SUFFICIENT EVIDENCE TO DISCREDIT RESPONDENT'S LEGITIMATE NON-DISCRIMINATORY REASON FOR TERMINATING HIM 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Andrews v. Ohio, 104 F.3d 803 (6th Cir. 1997) 5

Kocsis v. Multi-Care Mgmt., 97 F.3d 876 (6th Cir. 1996) 5

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 8, 9

McKay v. Toyota Motor Mfg., U.S.A., 110 F.3d 369 (6th Cir. 1997) 5

Monette v. Electronic Data Sys. Corp., 90 F.3d 1173 (6th Cir. 1996) 4, 5

Roush v. Weastec, Inc., 96 F.3d 840 (6th Cir. 1996) 4

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) ... 7, 9

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 7, 8, 9

STATUTES

28 U.S.C. §1254(1) 1

42 U.S.C. §12101, *et seq* 1

42 U.S.C. §12112(a) 1

42 U.S.C. §12114(c) 9

42 U.S.C. §12114(c)(1)-(2) 6

RULES

Supreme Court Rule 10 10

OPINIONS BELOW

All relevant opinions are included in the Appendix to the Petition.

JURISDICTIONAL STATEMENT

Petitioner prays for exercise of this Court's jurisdiction pursuant to 28 U.S.C. §1254(1) which permits review by writ of certiorari before or after rendition of a judgment or decree by a United States Court of Appeals. The Court should decline to exercise its jurisdiction. The Sixth Circuit's decision affirming the District Court's grant of summary judgment does not conflict with the decision of another United States Court of Appeals on the same important matter, nor does it decide an important federal question in a way that conflicts with relevant decisions of this Court or of a state court of last resort.

STATUTE INVOLVED

This case involves the Americans With Disabilities Act ("ADA"), 42 U.S.C. §12101, *et seq.* Specifically, it involves Title I of the ADA, 42 U.S.C. §12112(a), which provides:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

STATEMENT OF THE CASE

Petitioner's employment with Respondent was terminated on May 4, 1994, after he reported to work on May 2, 1994 under the influence of alcohol. (Petition at A13.) Petitioner sued Respondent alleging a violation of the ADA. On May 29, 1996, the district court determined that petitioner failed to set forth a *prima facie* case under the ADA, and that he failed to rebut Respondent's legitimate business reasons for terminating him. (Petition at A20-A36.)

On appeal, the Sixth Circuit affirmed the district court, finding that Petitioner had not set forth a *prima facie* case under the ADA, and, even if he had, that Respondent had articulated a legitimate, nondiscriminatory reason for terminating Petitioner, and that Petitioner failed to offer sufficient evidence to rebut Respondent's reason for terminating him. (Petition at A12-A19.)

A brief summary of the facts of this case is warranted. Petitioner was employed as a supervisor by Respondent, a food producer in McComb, Ohio. (Petition at A50.) He was terminated because, on May 2, 1994, he reported to work under the influence of alcohol, in violation of an established work rule. (Petition at A18-A19.) Several managers and supervisors interacted with Petitioner on May 2, 1994, and testified that he spoke with slurred speech, staggered, talked loudly, was profane, was aggressive, "talked bravely," acted belligerently, looked drunk, had difficulty walking, and smelled of alcohol. (Petition at A15-A16.) Petitioner denied that he

was under the influence of alcohol, and instead claimed that he was suffering from back pain and lack of sleep. (Petition at A16.) Petitioner does not deny that he used profanity, spoke with slurred speech, talked loudly, acted belligerently, and he smelled of alcohol. (*Id.*)

Petitioner claims that he was widely and erroneously regarded by Respondent employees as suffering from alcoholism. (Petition at A13.) He claims that he is not an alcoholic, but that he suffers from rosacea – a skin condition that causes blotchy skin and an enlarged nose – and that this condition caused a number of Respondent employees to regard him as an alcoholic. (Petition at A49.) It is undisputed that Respondent employees believed Petitioner suffered from a drinking problem. (Petition at A13-A14.) Nonetheless, Respondent's termination of Petitioner stemmed from the fact that he reported to work exhibiting signs of intoxication (i.e. slurred speech, belligerent attitude, odor of alcohol, difficulty walking), not because his skin was blotchy or his nose was red or enlarged. (Petition at A15-A16.)

ARGUMENT

A. QUESTION ONE: PETITIONER'S ASSERTION THAT THE SIXTH CIRCUIT STATED THE WRONG *PRIMA FACIE* TEST DOES NOT WARRANT SUPREME COURT REVIEW.

1. The Sixth Circuit Has Repeatedly Stated The Correct *Prima Facie* Test.

Petitioner asks this Court to review the *prima facie* standard for establishing a claim of discrimination under the ADA, claiming that the Sixth Circuit's use of the sole cause requirement in the *prima facie* case is error, and in contrast with other circuits.

Respondent admits that the Sixth Circuit, in this case, stated a *prima facie* case different from the one it typically employs, including the sole cause requirement. (Petition at A16.) The sole cause requirement should not be included in the *prima facie* case. Where one has proved that the sole cause of an adverse employment action was his or her disability, one has met his or her ultimate burden of proof in an ADA case. *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1178 (6th Cir. 1996) (distinguishing among the elements required to be proven, the burden in direct evidence cases, and the burden in indirect evidence cases). Indeed, in the instant case, the Sixth Circuit purports to import the *prima facie* test from its decision in *Roush v. Weastec, Inc.*, 96 F.3d 840 (6th Cir. 1996), but a careful review of that case demonstrates that the court was stating the ultimate burden of proof rather than the *prima facie* case. *Roush*, 96 F.3d at 843. The issue of sole cause is not relevant at the *prima facie* level.

The *prima facie* test set forth in the Sixth Circuit's opinion is not the test that is usually set forth by the Sixth Circuit in ADA cases. For example, in *Monette*, the Court stated that, in order to prove a *prima facie* case, a plaintiff must establish that he or she is disabled; that he or she is otherwise qualified for the position, with or without reasonable accommodation; that he or she suffered an adverse employment decision; that the employer knew or had reason to know of the plaintiff's disability; and that the position remained open while the employer sought other applicants or the disabled individual was replaced. *Monette*, 90 F.3d at 1186. This test has also been set forth and applied in *McKay v. Toyota Motor Mfg., U.S.A.*, 110 F.3d 369 (6th Cir. 1997); *Andrews v. Ohio*, 104 F.3d 803 (6th Cir. 1997); and *Kocsis v. Multi-Care Mgmt.*, 97 F.3d 876 (6th Cir. 1996), none of which contain the "sole cause" requirement included in the *prima facie* case set forth by the Sixth Circuit in the instant case.

Thus, while the Sixth Circuit may have misstated its own test in the instant case, that test has not been used before or since by the Sixth Circuit. It is unnecessary for this Court to review this case solely for the purpose of correcting the misstatement of the *prima facie* case. The misstatement is of no precedential value given that the Sixth Circuit has, both before and since its opinion in the instant case, stated the *prima facie* case correctly, and given that the instant case is not a reported case. Moreover, as demonstrated herein, the misstatement was not relevant to the ultimate outcome of this case.

2. Regardless Of How The *Prima Facie* Case Is Stated, Respondent Has Not Met It.

Regardless of how the *prima facie* case of disability discrimination is defined, Petitioner cannot meet that test. That is because *any prima facie* case of disability discrimination, even the misstatement set forth in the Sixth Circuit's opinion in this case, contains as its first element the requirement that the plaintiff prove that he or she is disabled. Petitioner failed to establish either a disability or a perceived disability.

Petitioner claims that, because he suffered from rosacea, he was perceived by Respondent as having the substantially limiting impairment of alcoholism. As the district court in this case held, Petitioner pointed to nothing in the record indicating that the Respondent perceived or considered alcoholism *per se* to be a substantially limiting impairment. (Petition at A31.) While Respondent did have policies regarding alcohol, each of those policies, positions or statements related to alcohol *use*, as opposed to alcoholic *status*. (*Id.*) Federal law expressly provides that an employer may prohibit the use of alcohol at the workplace by all employees, and may prohibit employees from appearing at work under the influence of alcohol. 42 U.S.C. §12114(c)(1) - (2). Thus, as the district court correctly concluded, Petitioner is not an "individual with a disability" pursuant to the ADA. (Petition at A31.) Consequently, this Court should not review this case to refine or correct the Sixth Circuit's statement as to what constitutes a *prima facie* case when, whatever the *prima facie* case, Petitioner cannot establish

it because he is not disabled and was not perceived as disabled within the meaning of the ADA.

3. Even If Petitioner Had Set Forth A *Prima Facie* Case Of Disability Discrimination, His Case Nonetheless Fails On Summary Judgment.

The entire issue of the elements of a *prima facie* case is moot in the instant action. This is because the Sixth Circuit held that, even if Petitioner had established a *prima facie* case of disability discrimination, summary judgment was nonetheless warranted because Petitioner failed to offer sufficient evidence to rebut Respondent's proffered explanation for its decision to terminate him. (Petition at A19.) This Court has stated that " '[i]f the defendant carries the burden of production, the presumption raised by the *prima facie* case is rebutted,' *[Texas Dept. of Community Affairs v.] Burdine*, 450 U.S. [248,] 255 [(1981)], and 'drops from the case,' *id.* at 255, n. 10." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). Therefore, when the argument proceeded to the subject of Respondent's legitimate, nondiscriminatory reason for firing Petitioner, the *prima facie* case issue dropped from the case and was no longer of any import. Even if there was a misstatement of the *prima facie* case by the Sixth Circuit, it is mooted by the fact that the Sixth Circuit addressed the issue of Respondent's legitimate, nondiscriminatory reason for terminating Petitioner. Thus, if this Court reviewed this case, set forth a new *prima facie* case, and remanded the case, the outcome would be the same; because Petitioner did not rebut Respondent's

legitimate, nondiscriminatory reason for terminating Petitioner, summary judgment in favor of Petitioner would be warranted.

B. QUESTIONS TWO AND THREE: THERE IS NO REASON FOR THIS COURT TO REVISIT THE SIXTH CIRCUIT'S FINDING REGARDING WHETHER PETITIONER SUBMITTED SUFFICIENT EVIDENCE TO DISCREDIT RESPONDENT'S LEGITIMATE NONDISCRIMINATORY REASON FOR TERMINATING HIM.

In his second and third questions presented for review, Petitioner asks this Court to review the issues of whether he presented sufficient evidence that he was discharged because of a perceived disability and whether the evidence he submitted was sufficient to rebut Respondent's legitimate nondiscriminatory reason for terminating him. Neither of these issues merits review by this Court.

Both of these issues relate to the portion of the burden shifting analysis that occurs after a plaintiff has established a *prima facie* case of discrimination. The employer is then required to "articulate some legitimate, nondiscriminatory reason" for its action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The plaintiff, who bears the burden of persuasion throughout the entire process, then must demonstrate that the proffered reason was not the true reason for the employment decision. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

In the instant case, Respondent identified a legitimate, nondiscriminatory reason for terminating Petitioner: Respondent believes that on May 2, 1994, Petitioner reported to work under the influence of alcohol. This belief is based upon the testimony of several employees who witnessed Petitioner exhibiting the typical behaviors of an intoxicated person. The ADA provides that employers "may prohibit . . . the use of alcohol at the workplace by all employees" and "may require that employees . . . not be under the influence of alcohol at the workplace." 42 U.S.C. §12114(c). Thus, termination of an employee for reporting to work under the influence of alcohol constitutes a legal, legitimate and nondiscriminatory reason for termination.

Having met its burden of production, the Petitioner was then required to rebut the proffered legitimate, nondiscriminatory reason either directly by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. at 517 (1993) (*citing Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 256 and *McDonnell Douglas Corp. v. Green*, 411 U.S. at 804-805). To do so, Petitioner relied upon his own affidavit that he was not intoxicated on the day in question, and the affidavit of a co-worker that he was not intoxicated on the day in question. (Petition at A63-A68.) The Sixth Circuit and the district court both found this evidence unavailing.[1] (Petition at A19, A31-A33.)

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[1] The reason for such a finding is apparent: Petitioner's denials and his co-worker's impressions do not constitute

There is simply no reason for this Court to review the determination that Petitioner failed to offer sufficient evidence to rebut Respondent's legitimate, nondiscriminatory reason for terminating him. This Court rarely grants a petition for writ of certiorari where the asserted error consists of the misapplication of a properly stated rule of law. S.Ct. Rule 10. The Sixth Circuit correctly identified the burden shifting analysis to be employed if a plaintiff has set forth a *prima facie* case. (Petition at A16-A17, A19.) This Court need not review the Sixth Circuit's application of that rule of law to the instant case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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evidence that Respondent considered alcoholism, as opposed to alcohol *use*, to be a substantial threat to an employee's job performance. (Petition at A33.) Moreover, the issue is not whether Petitioner was intoxicated, but whether Respondent's belief that he was intoxicated was the reason for the termination.